TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 745.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

PHŒBE A. NORTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 15, 1877.

SUPREME COURT OF THE UNITED STATES.

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1 Pleas in the Circuit Court of the United States for the Northern District of Illinois, held at the United States court rooms, in the city of Chicago, in the district aforesaid, before the ıdges thereof, on Wednesday, the tenth day of January, in the ar of our Lord one thousand eight hundred and seventy-seven, d of our independence the one hundred and first year.

WILLIAM H. BRADLEY, *Clerk.*

PHŒBE A. NORTON
vs.
IE KNICKERBOCKER LIFE INSURANCE COMPANY. } Assumpsit.

ORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the 21st day of April, A. D. 1876, me said defendant, by Messrs. Miller and Frost, its attorneys, id filed in the office of the clerk of the Circuit Court of the nited States for the Northern District of Illinois, at Chicago, in he district aforesaid, its bond for costs, together with a transcript of the record of the proceedings had in the Superior Court of Cook County, in the State of Illinois, in said entitled cause,

2 which said bond for costs and transcript are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

Circuit Court, May term, A. D. 1876.

PHŒBE NORTON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY. } In assumpsit.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the defendant of any costs ordered or adjudged to be paid by it, hereby agree and stipulate that execution may issue against our property for any costs taxed against it. Dated this 21st day of April, A. D. 1876.

MILLER AND FROST.

(Endorsed:) Filed April 21st, A. D. 1876. Wm. H. Bradley, clerk.

Transcript of Record from Superior Court.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS,
COUNTY OF COOK. } *ss.*

3 Pleas before the Honorable Joseph E. Gary, one of the judges of the Superior Court of Cook County, in the State

of Illinois, holding a branch court of said court at a regular term of said Superior Court of Cook County, begun and holden at the court-house in the city of Chicago, in said county and state, on the first Monday, being the third day of April, in the year of our Lord one thousand eight hundred and seventy-six, and of the indepen dence of the United States of America the one hundredth

Present, the Honorable Joseph E. Gary, judge of the Superio Court of Cook County; Charles H. Reed, prosecuting attorney Francis Agnew, sheriff of Cook county.

Attest: JOHN J. HEALY, *Clerk.*

Be it remembered, that heretofore, to wit, on the eighth day March, in the year of our Lord one thousand eight hundred an seventy-six, Phœbe Norton, by Crawford and McConnell, h attorneys, filed in the office of the clerk of the Superior Court c Cook County her certain precipe for summons, which is in word and figures as follows, to wit:

STATE OF ILLINOIS, } *ss.*
COOK COUNTY. }

Superior Court of Cook County. To the April term, A. D. 1876.

4

PHŒBE NORTON, PLAINTIFF,
vs.
KNICKERBOCKER LIFE INSURANCE COMPANY,
Defendant.

} Asst. Damages, $12,000.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case on promises, to the damage of said plaintiff in the sum of twelve thousand dollars. Direct the same to the sheriff of Cook county to execute and make it returnable to the April term of said court, A. D. 1876.

CRAWFORD AND McCONNELL,
Plaintiff's Attorneys.

To J. J. HEALY, ESQ., *Clerk.*
CHICAGO, *March 8th*, 1876.

And thereupon, on the day and year last aforesaid, to wit, March 8th, 1876, there issued out of the office of the clerk of said court the people's certain writ of summons, which said writ, with the return of the sheriff thereon endorsed, is in words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss.*
COOK COUNTY. }

The people of the State of Illinois, to the sheriff of said county, greeting:

We command you that you summon Knickerbocker Life Insurance Company, if they shall be found in your county, personally

to be and appear before the Superior Court of Cook County
5 on the first day of the term thereof, to be holden at the court-house in Chicago, in said Cook county, on the first Monday of April next, to answer unto Phœbe Norton on a plea of trespass on the case upon promises, to damage of said plaintiff, as it is said, in the sum of twelve thousand dollars.

And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness John J. Healy, clerk of our said court, and the seal thereof, at Chicago, aforesaid, this 8th day of March, A. D. 1876.

[SEAL.] JNO. J. HEALY, *Clerk.*

(Endorsed:) The president of the within-named company not being found in this county, I have served the within writ by reading and by delivering a copy thereof to Charles C. Feeney, an agent of said within-named company, this 10th day of March, 1876. Francis Agnew, sheriff. By J. R. Wilkins, deputy. 1.00 paid.

And afterwards, to wit, on the thirtieth day of March, in the year last aforesaid, to wit, 1876, the said defendant, by Miller and Frost, its attorneys, filed in the office of the clerk of said court its certain petition, affidavit, and bond for removal, which are in words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss.*
6 COOK COUNTY. }

Superior Court of Cook County, April Term, A. D. 1876.

PHŒBE NORTON }
vs. }
KNICKERBOCKER LIFE INSURANCE COMPANY. }

To the honorable the Superior Court of Cook County, in the State of Illinois.

The petition of the Knickerbocker Life Insurance Company of the city of New York, in the State of New York, respectfully shows—

That your petitioner is the defendant in this suit, and that the same was brought by Phœbe Norton, plaintiff in this court, on or about the 8th day of March, A. D. 1876, and that the said plaintiff is and was at the time of bringing this suit a citizen of the State of Illinois, and that your petitioner is and was at the time of bringing this suit a corporation created and organized under and by virtue of the laws of the State of New York, and a citizen of the State of New York.

Your petitioner further respectfully shows that the said plaintiff claims in the writ and declaration in this suit, as damages against your petitioner, the sum of twelve thousand dollars, and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs.

7 And your petitioner further respectfully represents that this suit is now pending for trial in the said Superior Court of Cook County, Illinois, and that the April term, A. D. 1876, is the first term of said court at which said cause could be tried since the commencement thereof, and that the same has not yet been tried, but is pending for trial in said superior court.

And your petitioner represents that it desires to remove this suit before the trial thereof into the next Circuit Court of the United States, to be held in the Northern District of Illinois, in the 7th circuit, in pursuance of the statutes of the United States in such case made and provided, and particularly under the act of Congress approved March 3d, 1875, authorizing the removal of causes from state courts, and for other purposes, and that it is ready and willing to give such good and sufficient security as this court may direct for its doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States court, and it offers herewith its bond, executed by Henry G. Miller and Thomas G. Frost, of Chicago, Cook county, Illinois, as sureties, in the penal sum of five hundred dollars, conditioned that your petitioner shall enter in said circuit court, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court, if said circuit court

8 shall hold that such suit was wrongfully or improperly removed thereto, and shall do or cause to be done all such other necessary or appropriate acts required by said act of Congress, or by the laws of the United States, to be done upon the removal of a suit into the United States court, as good and sufficient surety, according to the said provisions of law, upon the removal of a suit into the United States court.

And your petitioner therefore prays that the said bond may be accepted as good and sufficient surety, according to the said provisions of law, and that the said suit may be removed into the next Circuit Court of the United States, to be held in the Northern District of Illinois, in the 7th circuit, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court. And your petitioner will ever pray, &c.

THE KNICKERBOCKER INS. CO.,
By J. A. NICHOLS, *President.*

MILLER AND FROST,
Attorneys for Defendant.

Affidavit.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } *ss.*

John A. Nichols, being duly sworn, upon oath deposes and says, that he is the president of the Knickerbocker Life Insurance Com-

pany, the petitioner therein named, and that he has read the foregoing petition, and that the same is true, as he is informed and verily believes.

9 J. A. NICHOLS.

Subscribed and sworn to by John A. Nichols, before me, is 27th day of March, 1876.

JOHN C. FOSTER, JR.,
[Notarial Seal.] *Notary Public, King's Co., N. Y.*

Bond.

ATE OF ILLINOIS, } ss.
OOK COUNTY. }

Superior Court of Cook County, April Term, A. D. 1876.

PHŒBE NORTON }
vs. }
KNICKERBOCKER LIFE INSURANCE COMPANY. }

Know all men by these presents, that we, the Knickerbocker Life Insurance Company of New York, as principal, and Henry G. Miller and Thomas G. Frost, of Cook county, Illinois, as sureties, are held and firmly bound unto Phœbe Norton, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Phœbe Norton, her heirs, executors, administrators, or assigns, for which payment well and truly to be made we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents.

In testimony whereof the said Knickerbocker Life Insurance Company has caused these presents to be subscribed by their president, and their corporate seal to be affixed hereto, and the
10 said Henry G. Miller and Thomas G. Frost have hereto subscribed their names, and affixed their seals, this 29th day of March, A. D. 1876.

Whereas a suit was brought, on or about the 8th day of March, A. D, 1876, in the superior court of Cook county, by the said Phœbe Norton against the said Knickerbocker Life Insurance Company, and the same is now pending for trial in the city of Chicago in said county of Cook and the court aforesaid, and is returnable into the Circuit Court of the United States for the Northern District of Illinois, in the Seventh Circuit, under the laws of the United States, and particularly under the act of Congress approved March 3rd, A. D. 1875, authorizing the removal of causes from state courts, and for other purposes; and whereas the said Knickerbocker Life Insurance Company has filed its petition in the said superior court of Cook county for the removal of such suit into the next circuit court of the United States to be held in the northern district of Illinois: Now, therefore, the condition of the above obligation is such that if the above bounden Knickerbocker Life Insurance Company shall

enter in said circuit court, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court, if said circuit court shall hold that such suit was wrongfully or improperly removed thereto, and shall do or cause to be done all such other necessary
11 appropriate acts as are required by said act of Congress by the laws of the United States to be done upon the moval of a suit into the United States court, then the above obligation to be void, otherwise to remain in full force and virtue.

THE KNICKERBOCKER LIFE INS. CO.,
[SEAL.] By J. A. NICHOLS, *President.*
HENRY G. MILLER. [SEAL.]
T. G. FROST. [SEAL.]

And afterwards, to wit, on the tenth day of April, in the year last aforesaid, to wit, 1876, the same being one of the days of the April term of said court, the following, among other proceedings, was had in said court and entered of record, to wit:

PHŒBE NORTON
vs. } Assumpsit.
KNICKERBOCKER LIFE INSURANCE COMPANY.

And now, on this day, comes the plaintiff to this suit, by Crawford and McConnell, her attorneys, and the defendant, by Miller and Frost, its attorneys, also comes and files herein its petition, based on affidavit, to remove said cause to the United States Circuit Court in and for the Northern District of the State of Illinois, and, it appearing to the court that the said defendant has filed herein its bond, conditioned according to the act of Congress in such case
12 made and provided, it is ordered by the court that said cause be and the same is hereby transferred to the said United States circuit court, and that the clerk of this court do forthwith transmit to said United States circuit court a transcript of all papers and pleadings filed in this cause, together with all orders made and entered of record herein.

STATE OF ILLINOIS, } *ss.*
COOK COUNTY. }

I, John J. Healy, clerk of the superior court of Cook county, within and for the State of Illinois, do hereby certify that the above and foregoing is a full, true, and complete transcript of all papers and pleadings now on file in my office and of all orders made and entered of record in said court, together with a certain petition, affidavit, and bond for removal, now on file in my office, in a certain cause lately pending in said court, on the common-law side thereof, wherein Phœbe Norton was plaintiff and the Knickerbocker Life Insurance Co. defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Chicago, this 13th day of April, A. D. 1876.

[SEAL.] JNO. J. HEALY, *Clerk.*

(Endorsed:) Filed April 21, 1876. Wm. H. Bradley, Clk.

And on the same day, to wit, the 21st day of April, A. D. 1876, the said plaintiff, by her attorneys, filed in said rk's office her declaration in said entitled cause, which said dec- ration is in the words and figures following, to wit:

Declaration.

NITED STATES OF AMERICA,
ORTHERN DISTRICT OF ILLINOIS. }

n the United States Circuit Court in and for the Northern District of Illinois. To the May term, A. D. 1876.

Phœbe A. Norton, a citizen of the State of Illinois, plaintiff in this suit, by Crawford and McConnell, her attorneys, complains of the Knickerbocker Life Insurance Company of the city of New York, a corporation duly organized and existing under and by virtue of the laws of New York, defendant in this suit, of a plea of trespass on the case on promises.

For that whereas, heretofore, on, to wit, the second day of April, in the year of our Lord one thousand eight hundred and seventy-four, at, to wit, the city of New York, to wit, in the district aforesaid, made its certain policy of insurance, wherein and whereby in consideration of the representations made to it, the said defendant, on the application for said policy of insurance and of a premium of three hundred and eighty-five dollars then and there paid to
14 the said defendant, and of a premium of like sum to be paid to it, the said defendant, on or before the twentieth day of April in every year during the continuance of said policy of insurance, it did assure the life of Jesse O. Norton, deceased, husband of the said plaintiff, in the amount of ten thousand dollars, for the sole use of said plaintiff, or in the event of her death, upon the death of her said husband, then for the use of her said husband, then for the use of her children, as is in said policy more particularly set forth. And the said defendant then and there promised and agreed to pay to the said plaintiff, for her sole use, if living, in conformity with the statute in such case made and provided, and if not living, to her children, or to their guardian, for their use, in three months after due notice and satisfactory proof of the death of the person whose life was in said policy of insurance insured, the balance of the year's premium, if any, and any counter-claim or indebtedness thereinafter mentioned being first deducted therefrom.

And the said plaintiff and defendant made and entered into certain agreements and conditions in and by said policy of insurance, more particularly set forth in the said policy of insurance, of which the following is a true copy and is made part of this declaration, to wit:

No. 2,245 | 16,822. Age, 54 years.

15 This policy of insurance witnesseth that the

Knickerbocker

Premium, $385. Insurance, $10,000.

Life Insurance Company
of the City of New York,

In consideration of the representations made to them in the application for this policy, and upon the faith of which the same is issued, and of the premium of three hundred and eighty-five dollars and no cents to them in hand paid by Phebe A. Norton, wife of Jesse O. Norton, of Evanston, in the State of Illinois, and of the premium of a like sum to be paid on or before the twentieth day of April in every year during the continuance of this policy, do assure the life of the said Jesse O. Norton in the amount of ten thousand dollars, for the term of his natural life, for the sole use of his wife, or in the event of her death before the death of her said husband, then for the use of her children, as hereinafter stated, subject to the clause written on the back, which forms a part and parcel hereof.

And the said company do hereby promise and agree to pay the amount of the said insurance at their office, in the city of New York, to the said Phebe A. Norton, for her sole use, if living, in conformity with the statute, and if not living, to her children, or to their guardian, for their use, in three months after due

16 notice and satisfactory proof of the death of the said person whose life is hereby assured, the balance of the year's premium, if any, and any counter-claim or indebtedness hereinafter mentioned being first deducted therefrom.

And the said company further agree that if after premiums on this policy for not less than three complete years shall have been duly received by them said policy shall cease, in consequence of the non-payment of premium thereon, the company will, on due surrender of this policy and the dividends thereon, within three months after the said policy shall so cease and determine, issue, in lieu thereof, another policy, payable as above, for an equitable amount, to be determined by the company, but which, in case the age of the person whose life is hereby insured is now under forty years, shall be at the date of such surrender under sixty years, shall not be less than the sum of the ordinary premiums actually received by the company upon this policy. *Provided*, however, that in case the said premium so actually received shall not amount to one hundred dollars, the company reserves the right to pay the surrender value in lieu of issuing such new policy.

This policy is issued and accepted by the assured upon the following express conditions and agreements, to wit:

First. If the said person whose life is hereby insured shall travel upon the seas (except in voyages between coastwise ports of the United States), or shall pass or remain beyond the settled sections of the United States, or beyond their protection except into the settled portions of the Dominion of Canada and the British provinces), or shall enter into any military or naval service whatever, (the militia not in actual service excepted,) or shall personally engage in blasting, mining, submarine operations, or the production of dangerously inflammable or explosive substances, or working or managing a steam engine in any capacity, or shall be employed as a mariner, engineer, fireman, conductor, or laborer in any capacity whatever, in any sea, sound, inlet, river, lake, or railroad, without the consent of this company, in each or either of the foregoing cases, previously given in writing, or if said person shall die by his own hand or act, whether sane or insane, or in, or in consequence of, a duel, or of the violation of any law of any nation, state, or province, or by the hand of justice; or if his death shall be caused by the habitual use of intoxicating drinks or opium, or if any of the statements or declarations made in or accompanying the application for this policy, and upon the faith of which the same is issued, shall be found in any respect untrue, then and in every such case this policy shall be null and void.

Second. If the said premium shall not be paid on or before twelve o'clock noon on the day or days above mentioned for the payment thereof at the office of the company in the city of New York, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the president or secretary, or if the principal of, or interest upon, any note or other obligation given for the premium upon said policy shall not be paid at the time the same shall become due and payable, then and in every such case the company shall not be liable to pay the sum assured, or any part thereof, and said policy shall cease and be null and void without notice to any party or parties interested herein, except that the stipulation for a new policy, as hereinbefore provided, shall remain in force.

18

Third. In case a loan of, or credit for, a portion of said premium shall be made on this policy, said policy shall be subject to all of the terms and conditions expressed in the acknowledgment or obligation given for such loan or credit, and to the payment of interest thereon in advance, and said loan or credit shall be a just counterclaim against any amount which shall become due and payable on the policy and shall be deducted therefrom.

Fourth. In every case when this policy shall cease and determine, or become or be null and void, all payments thereon shall belong to the company, except that in case of the death of the insured by his own hand or act the company will, upon a surrender of the policy,

within three months after such death, return the net reserve on said policy.

Fifth. In case the said company shall at any time accept a payment of the premium on this policy after the time the same shall, by the terms hereof, become due and payable, such acceptance shall not in any respect be deemed to enlarge the time for the payment of premiums thereafter to become due on the policy, or be deemed any evidence of a usage of said company to accept payment of premiums after the same becomes due and payable.

(Across the face in red:) The premiums on this policy are payable wholly in cash without premium note, and the company is not under obligations to purchase it from the holder thereof. This policy is not entitled to dividends which have been discounted in advance.

Sixth. This policy is not assignable.

In witness whereof, the said Knickerbocker Life Insurance Company have caused this contract to be signed by their president and secretary, at the city of New York, this second day of April, one thousand eight hundred and seventy-four

GEO. SPRIFFIN, *Secretary.* J. A. NICHOLS, *President.*

Edition August, 1872.

K. L. I. Co.

O. F. Lange. Countersigned, April 2, 1874.

Agents of the company are not authorized to make, alter, or abrogate contracts, or waive forfeitures. Free permits will be granted upon application at the office of the company, permitting the party insured by this policy to make voyages between the United States and Europe in steamships or first-class sailing vessels, and to reside in Europe. For a voyage by any other vessel to any other country special permits will be granted on liberal terms on application to the company.

Neither this policy of insurance or renewal receipts of the same will be valid until the actual payment of the premium.

The within policy is issued in place of policy No 2,245 | 16,822, dated the twentieth day of April, eighteen hundred and sixty-seven, which has been surrendered, and in consideration of such surrender the company hereby stipulate and agree that this policy shall confer upon and yield and produce to the beneficiary thereunder all the benefits, profits, and advantages secured to or agreed to be conferred upon the holder and owner of such surrendered policy.

GEORGE SPRIFFEN, *Secretary.*
J. A. NICHOLS, *President.*

Original policy nearly destroyed in the great fire of Oct., 1871.
J. A. N.

No. 2,245 | 16,822.

Knickerbocker Life Insurance Company of the City of New York.
Office, 239 Broadway.

Insurance on the life of Jesse O. Norton.

Registered.	Folio.
m't insured	$10,000
" of premium	385 00
olicy Fee.	

$385 becomes due annually the 20th of April.
W. B. O.

21 And the plaintiff avers that after the execution and delivery of said policy of insurance, to wit, on the third day of August, A. D. 1875, at, to wit, Chicago, in the district aforesaid, the said Jesse O. Norton departed this life, of which said defendant had notice. And the plaintiff further avers that after the decease of her said husband, the assured, to wit, on the 10th day of August, A. D. 1875, she proceeded to the office of the said defendant company in Chicago, to wit, in the district aforesaid, and then and there offered and expressed her desire to furnish the said proof of the death of the assured agreed in said policy to be furnished, but the said defendant then and there refused to receive said proofs of the death of the said Jesse O. Norton, deceased, and waived all their right to claim the same, and declined and refused to pay the said sum of ten thousand dollars to the said plaintiff, as it in its said policy of insurance had promised to pay under the terms and conditions therein set forth.

22 And the said plaintiff further avers that, although the insured and she, the said plaintiff, have in all things conformed themselves to and observed all and singular the said conditions, agreements, matters, and things by them or either of them to be observed and performed, according to the form and effect of said policy of insurance, yet she, the said plaintiff, has not in any manner been paid the said sum of ten thousand dollars, as by the said defendant promised to her to be paid, or any part thereof, but the same remains wholly unpaid and unsatisfied, contrary to the force and effect of said policy of insurance and the promise and undertaking of the said defendant therein.

And the said defendant having notice of the premises, and although often requested by the said plaintiff to pay to her the said sum of ten thousand dollars so by it insured as aforesaid, did not, nor would, when it was so requested as aforesaid, or at any time before or since, pay the said sum of ten thousand dollars, or any part thereof, but has hitherto wholly refused and neglected and still does refuse and neglect so to do, to wit, at the district aforesaid, to the damage of the said plaintiff in the sum of twelve thousand dollars.

23 And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, became and was indebted to the said plaintiff in the further sum of, to wit, twelve thousand dollars of like lawful money as aforesaid for money before that time lent and advanced by the said plainti to the said defendant, and at the like request of the said defendan and in the like sum for other money by the said plaintiff befo that time paid, laid out, and expended for the said defendant, a at the like request of the said defendant; and in the like sum t other money by the said defendant before that time had and receiv to and for the use of the said plaintiff; and in the like sum f other money before that time and then due and owing the sa plaintiff for interest upon and for the forbearance of divers oth sums of money before that time and then due and owing from sa defendant to said plaintiff; and in the like sum for the price an value of work then done and material for the same provided b the said plaintiff for the said defendant, and at the like special re quest of the said defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

24 And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of, to wit, twelve thousand dollars of like lawful money as afosesaid, and being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of, to wit, twelve thousand dollars, and, therefore, the said plaintiff brings suit, &c.

CRAWFORD AND McCONNELL,
Plaintiff's Attorneys.

Copy of Account sued on.

24 To loss on policy of insurance from Knickerbocker Life Insurance Company to Phebe A. Norton on life of Jesse O. Norton..... $12,000 00

nickerbocker Life Insurance Company to Phebe A. Norton, Dr.

o money lent and advanced.....	$12,000	00
" paid, laid out, and expended.....	12,000	00
" had and received for the use of said pl'ff...	12,000	00
" money due for forbearance and interest....	12,000	00
o balance due on account stated.....	12,000	00

(Endorsed:) Filed April 21, 1876. W. H. Bradley, clerk.

Afterwards, to wit, on the 25th day of April, A. D. 1876, said defendant, by its attorneys, filed in said clerk's office its pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

In the Circuit Court of the United States.
May Term, A. D. 1876.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant, *ads.* PHŒBE NORTON, PLAINTIFF. } Assumpsit.

26 And the said defendant, by Miller and Frost, its attorneys, comes and defends the wrong and injury when, &c., and saith that it did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country, &c.

MILLER AND FROST,
Defendant's Attorneys.

And for a further plea in this behalf as to the said first count of the said declaration, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain her aforesaid action thereof against it, because it says that it was in and by said policy in said count of said declaration mentioned expressly provided and agreed by and between the said plaintiff and the said defendant and the said promises of the said defendant in said first count of said declaration mentioned were upon the express condition that if the said premium mentioned in said policy should not be paid on or before twelve o'clock noon, on the day or days above in said policy mentioned for the payment thereof, at the office of the said defendant, in the

city of New York, (unless otherwise expressly agreed in writing,) or to agents, when they produce receipts signed by the president or secretary, or of the principal of, or interest upon, any note
27 or other obligation given for premiums upon said policy, should not be paid at the time the same should become du and payable, then, and in every such case, the defendant should n be liable to pay the sum assured, or any part thereof, and sa policy should cease and be null and void, without notice to a party or parties interested therein. And the said defendant ave that after the time of the issuing of said policy of insurance, and secure the payment of a portion of the second annual premiu therefor, the said Jesse O. Norton made, executed, and deliver to said defendant his two several promissory notes, in writing, a bearing date on the twentieth day of April, A. D. 1875, in one which said promissory notes the said Jesse O. Norton promised t pay to the order of said defendant, two months after the dat thereof, one hundred sixty-seven and $\frac{50}{100}$ dollars, with interest from date, at six per cent., for value received, without grace; and in andt by the other of said promissory notes the said Jesse O. Norton promised to pay to the order of said defendant, three months after the date thereof, without grace, the sum of one hundred sixty-seven and $\frac{50}{100}$ dollars, with interest at six per cent. per annum, value received, on account of the premium on said policy in said first count of said declaration mentioned; and it was in each of said promissory notes recited that said policy would be void in
28 case said note was not paid at maturity, according to the contract in said policy. And said defendant avers that each of said promissory notes were given for and on account of the premium to be paid to said defendant for said policy, and that both of said promissory notes matured and became due and payable long before the death of said Jesse O. Norton; and the said defendant further avers that the said plaintiff did not, nor did the said Jesse O. Norton, nor any person or persons in behalf of the said plaintiff or the said Jesse O. Norton, pay the said promissory notes, or either of them, when the same became due and payable, nor the said premium, nor any portion thereof, so secured to be paid by said promissory notes as aforesaid, nor has the said plaintiff, nor the said Jesse O. Norton, nor any person or persons in behalf of the said plaintiff or the said Jesse O. Norton at any time since that time paid either of the said promissory notes or any portion thereof, nor the said premium or any portion thereof so secured to be paid by said promissory notes as aforesaid; by reason whereof the said policy in said first count of said declaration mentioned became and was wholly void and of no further force or effect. And this the said defendant is ready to verify. Wherefore it prays judgment, &c.

MILLER AND FROST,
Defendant's Attorneys.

29 And for a further plea in this behalf the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain her aforesaid action thereof against it, because, it says, that the said plaintiff, before and at the time of the commencement of this suit, to wit, January 1st, A. D. 1876, at, to wit, the district aforesoid, was and still is indebted to the said defendant in a large sum of money, to wit, the sum of five hundred dollars, for money by the said defendant before that time lent and advanced to and paid, laid out, and expended for the said plaintiff and at her request, and for money by the said plaintiff before that time had and received to and for the use of the said defendant, and for money due and owing from the said plaintiff to the said defendant for interest upon and for the forbearance of divers large sums of money due and owing from the said plaintiff to the said defendant and by the defendant forborne to the said plaintiff for divers long spaces of time before then elapsed, and for money due and owing from the said plaintiff to the said defendant upon an account stated between them, which said sums of money so due and owing to the said defendant as aforesaid exceed the damages sustained by the said plaintiff by reason of the non-

30 performance by the said defendant of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sums of money so due and owing from the said plaintiff to the said defendant the said defendant is ready and willing and hereby offers to set off and allow to the said plaintiff the full amount of the said damages, according to the form of the statute in such case made and provided.

And this the said defendant is ready to verify. Wherefore it prays judgment, &c.

MILLER AND FROST,
Defendant's Attorneys.

Copy of Account pleaded in set-off.

Phebe Norton to Knickerbocker Life Ins. Co., Dr.

1876.			
Jan. 1.	To money lent and advanced	$500	00
"	" paid, laid out, and expended	500	00
"	" had and received	500	00
"	" interest	500	00
"	" found due on account stated	500	00
"	To premium on policy 2,245 | 16,822, one year, less cash paid ($50)	335	00

(Endorsed:) Filed April 25, 1876. Wm. H. Bradley, Clk.

Afterwards, to wit, on the 29th day of May, A. D. 1876, the said parties filed in said clerk's office their stipulation in said en-

31 titled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS. } *ss.*

PHŒBE A. NORTON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY. } Assumpsit.

It is hereby stipulated that the plaintiff may file in answer to tl second plea of defendant two replications.

MILLER AND FROST,
Attys. for Deft.
CRAWFORD AND McCONNELL,
Attys. for Plaintiff.

(Endorsed:) Filed May 29, 1876. Wm. H. Bradley, Clk.

And on the same day, to wit, the 29th day of May, A. D. 1876, said plaintiff, by its attorneys, filed in said clerk's office her replication to the answer of said defendant in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA.

In the United States Circuit Court in and for the Northern District of Illinois, of the May term, 1876.

32 PHŒBE A. NORTON
against
THE KNICKERBOCKER LIFE INSURANCE COMPANY. } Assumpsit.

And the plaintiff, as to the plea of the defendant by it first above pleaded, and whereof it has put itself upon the country, does the like.

CRAWFORD AND McCONNELL,
Plff's Attys.

And the said plaintiff, as to the said plea of the defendant secondly above pleaded to the first count of the plaintiff's said declaration, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that she, by reason of anything by the said defendant in that plea above alleged, ought not to be barred from having and maintaining her aforesaid action against it, because, she saith, that before the maturity of the first of said promissory notes in said plea mentioned, the agent of the defendant stationed in the city of Chicago, regularly authorized by the defendant so to do, extended the time of payment of the said note to, to wit, the

20th day of July, 1875, and at said time the plaintiff tendered to the defendant's said agent, authorized by the defendant to receive all moneys due on account of said policy and said promissory notes, the full amount thereof, together with the interest due thereon, 13 but to receive the same the said agent and the defendant refused, and ever since has refused so to do. And the plaintiff alvs, as to the second promissory note in said plea mentioned, that before the maturity thereof, to wit, on the 15th day of July, A. D. 1875, the said defendant notified the said plaintiff that it would not receive the amount thereof, and although the said plaintiff, before and also at the maturity of the same, tendered to the said agent the full amount of said note, together with interest thereon, the said defendant refused to accept the same. And the plaintiff says that she was ever willing and ready to pay the said sums of money due on said notes, and is now willing to allow the said amounts to the defendant under the law and conditions of said policy, and this the said plaintiff is ready to verify. Wherefore she prays judgment, &c.

CRAWFORD AND McCONNELL,
Plff's Attys.

And the said plaintiff, as to the said plea of the defendant secondly above pleaded to the first count of the said declaration, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that she, by reason of anything by the said defendant in that plea above alleged, ought not to be barred from having and maintaining her aforesaid action against it, because, she saith, that after the maturity of the first promissory note mentioned in said plea, on, to wit, the 10th day of July, A. D. 1875, the agent of the said defendant, regularly authorized by the said defendant so to do, waived all advantages the company might have claimed 34 because of the non-payment of said note at maturity, and extended the time of paying the same to the 20th day of July, A. D. 1875, and that at said time the plaintiff tendered to the said agent, authorized by the company to receive all moneys due on said notes and said policy, the full amount of said note and interest due thereon, but the said agent, as instructed thereto by said defendant, refused to accept the same, and at the same time notified the plaintiff that they would acknowledge no further liability on said policy, and have ever since refused to accept the amount of said note. And the plaintiff saith that as to the second promissory note in said plea mentioned, that before the maturity thereof, to wit, on the 15th day of July, A. D. 1875, and again at the maturity thereof, she tendered to the defendant the full amount of said note, together with all interest due thereon, but to accept the same the defendant refused, and has ever since refused so to do, denying all liability on said policy. And the plaintiff saith that she has ever

been ready and willing to pay the said sums of money and discharge the said notes according to the tenor and effect thereof, and this the plaintiff is ready to verify. Wherefore she prays judgment.

CRAWFORD AND McCONNELL,
Plff's Attys.

(Endorsed:) Filed May 29, 1876. Wm. H. Bradley, cl'k.

35 Afterwards, to wit, on the 12th day of October, A. D. 187 said defendant, by its attorneys, filed in said clerk's office i rejoinder in said entitled cause, which said rejoinder is in the word and figures following, to wit:

Rejoinder.

Circuit Court of the United States, October Term, A. D. 1876.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

THE KNICKERBOCKER LIFE INSURANCE COMPANY
vs.
PHŒBE NORTON.

And the said defendant, as to the said first replication of the said plaintiff to the said second plea of the said defendant to the said first count of the said plaintiff's said declaration, saith that the said plaintiff ought not, by reason of anything by her in that replication alleged, to have or maintain her aforesaid action thereof against it the said defendant, because it says that the said defendant did not extend the time of payment of the said note in said replication mentioned as is in said replication alleged, and of this the said defendant puts itself upon the country, &c. MILLER AND FROST,
Defendant's Attorneys.

And the said defendant, as to the said second replication of the said plaintiff to the said second plea of the said defendant to
36 the said first count of the said plaintiff's said declaration, saith that the said plaintiff ought not, by reason of anything by her in that replication alleged, to have or maintain her aforesaid action thereof against it the said defendant, because it says that the said defendant did not waive all advantages the company might have claimed because of the non-payment of the said note in said replication mentioned at maturity, and did not extend the time of paying the same, and of this the said defendant puts itself upon the country, &c. MILLER AND FROST,
Defendant's Attorneys.

(Endorsed:) Filed Oct. 12, 1876. Wm. H. Bradley, clk.

Afterwards, to wit, on the 13th day of December, A. D. 1876, in the adjourned October term of said court, in the record of the pro-

ceedings thereof, in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

PHEBE A. NORTON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY. } Assumpsit.

al Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: C. G. Pettybone, B. F. Stedman, W. E. Sawyer, D. M. Ruger, Arthur
47 McGuire, W. L. Church, W. P. Dickinson, Thomas W. Osborn, John Pope, J. F. Chesney, N. S. Carrington, and Thomas A. Scott, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 14th day of December, A. D. 1876, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

PHEBE A. NORTON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We the jury find the issue for the plaintiff, and assess her damages to the sum of ten thousand three hundred and nine dollars and thirty-three cents. And thereupon the defendant, by its attorney, moves the court for a new trial herein.

And on the same day, to wit, the 14th day of December,
38 A. D. 1876, said defendant filed in said clerk's office her motion for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

Motion for a New Trial.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

Circuit Court of the United States.

PHŒBE NORTON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY. }

And now comes the defendant and moves for a new trial in this case, upon the following grounds:

1*st*. The verdict is contrary to law and to the instructions of the court.

2*nd*. The verdict is against evidence.

3*rd*. The court erred in refusing to instruct the jury on each of the several points in regard to which instructions were asked by the defendant, and as asked by the defendant.

4*th*. The court erred in his instructions to the jury, and especially in his instructions directing the jury to consider the usage and practice of the agent, Randall, in retaining and collecting premium notes after due, in determining the question of the authority of the clerk, Frary, to grant extensions.

5*th*. The court erred in refusing to give each several instruction asked by the defendant, numbered respectively one, two, three, four, five, and six.

39 6*th*. The charge to the jury was erroneous in regard to the question of the extension of payment on the premium notes, and to the evidence necessary and proper to establish such extension.

7*th*. The court erred in refusing to direct the jury to find a verdict for the defendant.

8*th*. The court erred in allowing the evidence of Randall and the other evidence objected to by the defendant to be admitted and considered by the jury.

9*th*. The court erred in refusing to allow the motion of the defendant to strike out the testimony of Randall as to the usage and practice of Randall, while acting as agent for the defendant, in retaining and collecting premium notes after due.

10*th*. The court erred in allowing any proof of extension under the declaration—the declaration charging that the plaintiff had fully performed the conditions of the policy, and, in effect, that the premiums or premium notes were paid at maturity.

MILLER AND FROST,
Attorneys for Defendant.

(Endorsed:) Filed Dec. 14, 76. Wm. H. Bradley, Clk.

Afterwards, to wit, on the 10th day of January, A. D. 1877, in the December term, A. D. 1876, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon.
40 Henry W. Blodgett, district judge, is the following entry, to wit:

PHŒBE A. NORTON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY. } Assumpsit.

Now comes the defendant, by its attorney, and the court, having considered and being now sufficiently advised upon the motion of the defendant heretofore entered for a new trial of this cause, overrules the same and awards judgment. It is thereupon consid-

ered and adjudged by the court that the plaintiff have and recover of the defendant the said sum of ten thousand three hundred and nine dollars and thirty-three cents, her damages so as aforesaid assessed, together with her costs and charges in this behalf expended, amounting to the sum of forty-five dollars, and that she have execution therefor.

And on the same day, to wit, the 10th day of January, A. D. 1877, on the trial of said cause, the following exceptions were taken and allowed by the court and made of record, and are in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

Circuit Court of the United States. December Term, A. D. 1877.

41 PHŒBE NORTON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY.

Bill of Exceptions.

Be it remembered, that heretofore, to wit, on the 13th day of December, A. D. 1876, at the December term of said court, before Hon. Henry W. Blodgett, district judge, &c., holding said court, the aforesaid issues so joined between the said parties as aforesaid came on to be tried by a jury of said district, for that purpose duly empaneled, at which day came here the parties aforesaid by their respective counsel, as well as the jurors aforesaid then and there in due manner chosen and sworn to try said issue, and upon the trial of said issue the counsel for said plaintiff, to maintain and prove the said issue on his part, introduced in evidence a policy of insurance issued by the defendant to the plaintiff upon the life of Jesse O. Norton, which, with the notice accompanying the same and attached thereto, together with the endorsement on the back thereof, was read to the jury, which said policy is set out at page 14 of this record.

Plff. also offered and read in evidence a receipt for the premium due April 20, 1874, which reads as follows:

Renewal No. 144,652.
Premium, $385.00

42 KNICKERBOCKER LIFE INSURANCE CO.,
No. 239 BROADWAY, NEW YORK, 20 *April*, 1874.

Policy No. 2,245 | 16,822, issued in favor of Phebe A. Norton, is hereby continued in force for twelve months from this date, to wit, until the twentieth day of April, 1875, at noon, subject to and upon the express condition that if any note or other obligation given for

any portion of the premium due this day upon said policy, together with the interest on any loan, note, or other obligation for premium thereon shall not be paid on the day when the same shall become due and payable, then and from thenceforth said policy and this continuation thereof shall immediately cease and become void without notice to the insured or insurer or any party or parties interested therein.

C. STANTON, *President.*

GEO. SPRIFFEN, *Secretary.*

43 To further maintain and prove said issue the counsel for the plaintiff called George C. Randall, who testified as follows:

My name is George C. Randall. I live at Chicago. Am present in the real estate business. Was formerly connected with the defendant, the Knickerbocker Life Insurance Company. For a time as collector, or, rather, cashier and book-keeper in the office, and afterwards as manager. Was first connected with the company in September, 1868. I think I met Jesse O. Norton once or twice. Remember the policy in controversy.

Counsel for plaintiff then put to the witness the following question, namely:

"Do you remember how Judge Norton ordinarily paid his pre-'miums?"

To which interrogatory the counsel for the defendant then and there objected as immaterial and incompetent. The court overruled the objection. To which ruling of the court the counsel for the defendant duly excepted. And the witness answered as follows:

"I discontinued my connection with the company in March, 1874. 'He paid some money down and gave notes. Sometimes he would 'give them at thirty, sixty, and ninety days—one or more notes— 'sometimes one note, sometimes more. I don't recollect exactly. 'He paid some money down and gave notes. Sometimes one note,

'sometimes two notes. These notes would run twenty, sixty,

44 'ninety days, and sometimes longer than that. I think on 'one occasion he gave one less than thirty days, and one in 'six months for the balance of the premium.

"These notes which were given to the company for these pre-'miums were sent to me for collection. I collected them through 'my office."

The counsel for the plaintiff then put the following question to the witness:

"Did Judge Norton pay these notes given for premiums upon 'the day they became due?"

To which interrogatory the counsel for the defendant then and there objected as immaterial and incompetent. The court allowed the question to be answered, reserving the right to exclude said

evidence if it should become satisfied the testimony was inadmissible. To which ruling of the court the counsel for the defendant then and there duly excepted. The witness answered:

"No, sir; he did not. He was a very slow payman—either hard up or very careless about the payment of his premiums. Sometimes he went a few days and sometimes even several weeks before he paid these notes after they came due."

Counsel for the plaintiff then put to the witness the following question:

"Will you state now whether or not the officers of the company were acquainted with the fact that you extended these indulgences?"

To which interrogatory the counsel for the defendant then and there objected as immaterial and incompetent.

The court overruled the objection. To which ruling of the court the counsel for the defendant then and there duly excepted.

The witness answered as follows:

"They were aware of it in this manner: that when a premium 'was collected it was my duty to report it at the end of the month 'to the company and pay the money over. If it was not paid, I 'retained the note, and if it was paid, I reported it to the company.

"If it was not reported paid in the next report following payment, and the collection was due, it would follow of course that 'that was not paid. If it was paid, I would report it in the next 'report. The company never objected to my extending this time-'indulgence to Judge Norton, that I know of—not that I recollect 'of.

"The company issued a policy to Judge Norton, in 1867, of similar tenor to the one now in evidence, which was nearly destroyed 'in the great fire in this city, October, 1871. Afterwards Judge 'Norton brought the old policy to my office. I sent it to the home 'office and got this policy and sent it to him in place of the old 'one."

Upon cross-examination by defendant's counsel, witness testified as follows:

"The only knowledge that the company had upon the 'subject was, that they did not get the money at the time it 'should have been paid. I do not know of any written correspondence particularly, between myself and the company, as to whether 'any indulgence should be given or not. Never saw any members 'of the company to have any oral conversation with them in respect 'to this policy."

The following question was then put by the court to the witness:

"Then I understand, Mr. Randall, you never reported any delinquency on these notes or this premium to the company?"

And the witness, in answer to said interrogatory, stated: "No, 'I did not report them."

To the following question put by the court, namely:

"Your inference simply is that the company knew he had not 'paid the notes during the month they became due, because you 'did not report it at the end of the month?"

The witness answered: "They knew it only in that way."

Upon his re-direct examination by counsel for plaintiff, the following interrogatory was put to the witness:

"What time did the company allow you to keep notes that were 'sent for collection before you made returns upon them?"

To which question counsel for defendant then and there
47 duly objected. Which objection was overruled by the court the court stating that the witness could answer whether they had any rule or usage on that subject. To which ruling of the court the counsel for the defendant then and there duly excepted.

The witness answered:

"We were, I believe, at first, allowed to retain them ninety days; 'afterwards, that time was reduced to sixty, and afterwards, to 'thirty days; but at first, during the first few years of my connection with the company, we were allowed to retain the collections 'for ninety days; afterwards, during the latter part of my connection, it was reduced to sixty days, and during the last six months, 'thirty days. We were allowed to retain the renewal and notes for 'collection that time before transmitting them to the home office. 'The moment the money was paid we forwarded the money. We 'were required to make reports to the company every month; 'during the last six months, every ten days—required to report and 'transmit the moneys collected. I kept the notes that were not 'paid till the time had expired that I was allowed to retain them. 'I reported the amount of money; I itemized them; gave the number of the policies; the name of the parties insured; the number 'of the renewal; the amount of money collected, and other details. 'Premiums unpaid, I retained, and did not say anything about.

'We were authorized to retain, at first, for ninety days. We
48 'were required to report simply the premiums that were 'paid; that is all."

Counsel for the plaintiff, to further support the issue on the part of the plaintiff, called as a witness Charles C. Frary, who testified as follows:

"My name is Charles C. Frary. Am a clerk in the Knickerbocker Life Insurance Company, and have been a year and ten months."

Counsel for the plaintiff then put to the witness the following question, namely:

"How long are you allowed to keep a collection, I mean to say 'a note which has been sent to you for collection, in your hands?"

To which interrogatory and the evidence offered the counsel for the defendant then and there objected as incompetent and immaterial.

The court overruled the objection, stating as follows:

"You can ask him how long he was allowed at the time this al-
'leged default occurred. You can ask what the usage was at the
'time this alleged extension was made."

To which ruling of the court the counsel for defendant then and there duly excepted, and the witness proceeded as follows:

"I, as a general thing, waited for instructions to return, but I always returned on or before the 15th of the month after they were due; that is, if they were due in November I returned them on or before the 15th of December, all of them, and any time be-
49 fore that time I accepted the payment of the notes, even after they were due, upon a medical examination and satisfactory proof of the parties' good health. I do not remember of the son of Judge Norton coming to my office in June and offering to pay one of these notes nor both of them. I remember he did in July. I told him that I had no receipt—that the receipt had gone to the company. I refused to accept payment of the notes, of course.

Judge Norton settled his premium for 1875 by paying fifty dollars in cash and gave two notes, each for $167.50, payable in sixty and ninety days from April 20th. And when young Norton offered to pay these notes I refused to accept payment of them.

Upon cross-examination the witness testified as follows:

These are the notes I speak of (referring to note shown.)

Counsel for defendant, by permission of the court, then offered in evidence the notes given for the premium by Jesse O. Norton, whose life was insured, which were afterwards read in evidence to the jury.

The conversation referred to when he tendered payment occurred on the 15th of July. Prior to that, on July 8th, Mr. Norton, Judge Norton's son, had made application to extend time. I told him that I could not give him the extension without instructions of the company, and that I would write them in regard to it and
50 would let him know. I wrote to the company. This is the letter I wrote (referring to paper shown witness.) I received an answer from the company on the 14th. This (referring to letter shown witness) is the answer I received.

The two foregoing letters referred to by the witness were then offered in evidence and were afterwards read in evidence to the jury.

I think it was the next day, on the 15th, that I saw Mr Norton again. I communicated to him what the result was. That was the time that there was an offer to pay. That is the first time I declined to receive the money.

Interrogatory. "What was your business as clerk for that company? What did you do?"

Answer. "I took care of the books and received collections."

Interrogatory. "Did you issue any policies?"

Answer. "No, sir."

Interrogatory. "Did you have any authority given to you in any way to extend time of payment after notes matured?"

Answer. "No, sir; I did not."

To further maintain the issue on the part of the plaintiff, counsel for plaintiff called Martin Norton, who was duly sworn, and testified as follows:

My name is Martin Norton. I am an insurance agent. I was the son of Judge Norton. I remember the circumstances under which I waited upon the agent of the Knickerbocker Life
51 Insurance Company and how I happened to do so. I was in the country. Father telegraphed me to come to Chicago. I came here on the 22d of June. I think it was the second day of June after I arrived, it was either Friday or Saturday, he showed me a notification from the Knickerbocker Life Insurance Company, saying something about a note that was due June 20th, and he told me to go over there, told me where the office was, where to find the agent, to go over there and tell him that he would pay that note on the 20th of the next month. I went over there, but the first time that I went there was no one there. The door was locked. The second time I went I found the agent. This was the first of the next week.

I do not know the agent. I have seen him to-day. It was the gentleman who was testifying a moment ago, Mr. Frary. I stepped up to the counter—he was a little distance off—and I told him that I wanted to get this note extended until the 20th of July, and he said he could not—something about he could not do it. I told him, "Why," says I, "Judge Norton told me to come over here and tell you that he would pay this note on the 20th of next month, and it would be all right," and he says, "oh, Judge Norton," and then he said to me, "tell the judge it is all right." I went back and told father so, and that is the last I heard about it until, I think, it was a few days after the 4th of July, probably the 7th or 8th—
52 father was then confined to the house. I got his mail every day, and a notification was received that another note was coming due on July the 20th. I took it up to father at night and showed it to him. In the morning he told me to see the agent—I don't know whether he knew his name; to go down and see the agent, and tell him that he was not very well—he was not very sick at the time—and he would be down probably in a week, or may be that he would not be down for two weeks; it would accommodate him to have this note extended so as to make it come due about the 10th of August. I went to the agent and told him what father said, and he said he had no power to extend this note any farther. He had done all he could, he said; he had settled the premium up by notes, &c., and he had given as much time as he could—something to that effect; and he would have to write to the company. That was a few days after the 4th, I think; probably the 7th or 8th. I told father of it that evening when I went home.

On, I think, the 13th of July, father told me to get the money and pay up both notes. I went down to the Knickerbocker office

and saw the agent, and told him that I had concluded to pay those notes, and that I wished to get the exact amount that was due, and I would pay both notes and have it closed up; so he got the notes out. I asked Frary the amount of these notes and he gave
53 it to me on a piece of paper. I told him I would pay to-morrow or next day and he gave me the figures, the amount of the notes, but whether it was to that day, or whether it was to the 15th, the day that I did offer to pay it, I don't know. I told him I would pay to-morrow or next day, that would be the 14th or 15th, and I took the amounts. I don't know exactly what his remark was, but the substance was, it was all correct. Whether he said "yes," or what he said, I don't remember. He gave me the amounts that would be due; that was the understanding that I had. I gave the amount to father, showed him the paper with the amounts on, and he told me to go down to Mr. Goodell, the president of the Fourth National, and see him about it, and get the money to pay it. I went there the next day. I disremember how it was that I did not get the money that day. I think Mr. Goodell was not there. That was on the 14th. I went there the next morning and Mr. Goodell told me that it was all right; to send the checks up to father to sign them. I sent the checks up and this was sent back with father's signature, and with the amounts filled in, and then I went right over to the Knickerbocker Life and offered payment, or I told them that I came over to pay those notes; I would take them now—something to that effect. He then replied that he had received a telegram from New York the night before, and that he had sent them off; he had sent them to New York; that he had come
54 over to my office—I was right across the street—that he came over to my office the night before, but he did not find me in, and I told him that was not right; that I did not consider that that was the way to do business. He said it was rather bad; he said he could do nothing at all. I offered to pay him and he would not take it. I then went to Mr. Goodell and told him about it, who told the teller of the bank to give me legal-tender notes for the amount of the first note. I took the legal-tender notes and went over there and tendered them, and demanded the notes, and he refused. He said he hadn't the notes; told me the same thing he did before; that he had sent both notes to New York.

Upon further cross-examination by counsel for defendant, witness testified as follows:

I called upon the agent of the Knickerbocker, on the 13th of July, and told him I had concluded to pay those notes. That was the language I used. I told him I would pay these notes. I would not say I said concluded, but I told him I wanted to get the amount of those notes, and that father would pay it, or we would pay it. I don't know which words I used, exactly. I first called upon this agent the beginning of the next week after I came home, in June; last part of the month. It was not in July. It would be about

two weeks before the second visit; a little more, I guess. It
55 was about the 7th or 8th of July that I made the second visit—the second time that I went there. It was after the 20th of June. I don't know if the note was then past due. If it was due on the 20th of June, it was past due. It was three or four days after the 20th of June. Kept no memorandum of what was said between me and the agent on that first visit. Never made any writing about it at that time. I have, since then. It was, I think, a day or two after father died. I made no memorandum of what was said at any of these interviews until after his death. When I first went into the office, on the 8th of July, I told the agent that father said he would like to have the first note extended so as to run to the 10th of August, and the note due July 20th, to run to that time; that would give him 30 days longer to pay, from the time I went there, and he would pay both notes at the same time. My request was not in writing. I never put it in writing. Don't know whether if the agent sat down at that time and wrote to the company what I said—his statement of it would be more likely to be correct than mine—or not. He told me he could do nothing about it; that he would have to write to the company; and said he would write to the company and communicate to the company my request. He said he would write to the company. That was the remark he made to me. I cannot say the date, exactly; 7th or 8th of July, I think. Next called on him the 13th
56 day of July; told him I wanted to get the amount of the notes. He did not say then that he had heard from the company. He did not say anything about it that I know of. He gave me the amounts of the notes. The next time I called on him was July 15th. He said he received a telegram from New York, last night—I think he said last night, or yesterday—to send those policies at once—immediately. My impression is that he said telegram. That is the most distinct recollection I have of it. I do not know as I am as positive on that subject as I am upon the other subjects that I have testified to. The impression that I got was that he had an order to send them; he might have said order, or something, but the impression on my mind was that he received a telegram. I know he received an order to send them. I would not swear whether it was by letter or telegram; but that is my impression. After that I made a legal tender—a formal tender of the amount due upon the first note—and I did not tender the amount of the second note. My father died August 3rd. The agent did not show me the letter he got from the company. I never saw it. He said that he had orders—a telegram or letter, as the case may be—I think it was a telegram; that is my impression; to send the notes on at once to New York. That was the understanding he gave me—that no extension could be granted.
57 I don't know that he said extension. He said he had to send them on. He was very sorry about it; that he came to the

office to tell me about it the night before—to see me about it—and I was not there.

Upon re-direct examination by counsel for plaintiff, the witness testified as follows:

He said nothing about writing to the company the first time at all.

Upon further cross-examination by the counsel for the defendant, the witness testified as follows:

I said something about the agent's having stated to me that it was all right. When I asked him the first time, I told him that Judge Norton said he would pay them about the 20th. He said, tell Judge Norton it was all right. I told father what he said. That was the first of the week after I got home, about the 26th or 27th of June, I think; I would not be quite positive; It was about that date. When I called upon him on the 13th of July I told him I would pay it to-morrow or the next day. Previous to that, on the 8th, I asked for an extension of the note of July the 20th—the extension of this note from the 20th till the 10th of August, and then let this other note run on till that time, so that father could pay them both at once—that was on the 8th or 10th of July, somewhere about there—and he told me that in respect to that matter he would have to write to the company about it. That is what he said.

58 It was here admitted by the counsel for the respective parties that the insured died on the 3d day of August, 1875, and that the proofs of death were waived at that time. The company insisting that it was not liable.

Thereupon the plaintiff, by her counsel, rested her case.

The counsel for the defendant moved to strike out that portion of the testimony of George C. Randall and of the witness C. C. Frary touching the usages of the company as to non-payment of prior premium notes by Norton, and prior indulgence thereupon to Norton, on the ground that such evidence was not competent or material in the case; that it conflicted with the terms of the policy and did not legally show or tend to show any authority in Frary to give the alleged extension; and also upon the ground that the extension, if made, and assuming the statement of witness, Norton, to be correct, was without a consideration, and was made after the forfeiture had occurred, and that by the terms of the policy and the notice accompanying the same the agents of the company were not authorized to alter the contract or waive forfeitures.

The court stated that he would hold said matter under consideration until the proof was all in.

59 The counsel for the defendant also moved the court to strike out that portion of the testimony of Martin Norton tending to show an agreement and relative to an agreement for an extension of the premium notes, which the witness testified to having made with Frary, the clerk or agent of the company, upon the ground that such agreement was without authority on the part of

the agent, without consideration, and after the forfeiture had occurred, and void. The court overruled the motion, and the counsel for the defendant to said ruling of the court in overruling said motion then and there duly excepted.

The counsel for the defendant, in order to maintain the issues on the part of said defendant, called the witness C. C. Frary, who, having been already sworn, testified as follows:

I have heard the testimony of Mr. Norton with regard to calling upon me on the 26th of June, and the statement that he made that I said that it was all right when he applied for an extension.

The counsel for the defendant then asked the witness the following question:

"Well, state how the fact was in regard to that;" and the witness answered:

"I have no recollection at all of his calling on me before July 8th; none whatever."

The following question was then put to witness:

"Well, if he did call upon you, did you say to him at any
60 time that it would be all right?" And the witness answered:
"No, I did not."

To the following question, namely:

"You are confident that you never stated that to him at any interview?" The witness responded:

"Yes, I am."

The counsel for the defendant then read in evidence to the jury the two notes referred to by the witnesses in their testimony, given by Norton for the premium due under the policy, and dated April 20th, 1875, payable in two and three months respectively; also the letter, also referred to by the witness Frary, sent by him to the defendant, the Knickerbocker Life Insurance Company of New York, dated Chicago, July 8th, 1875; also a letter from the Knickerbocker Life Insurance Company, the defendant, at New York, to the witness Frary, in reply, dated July 12th, 1875; also the receipt given by the company to Norton for the premium notes, &c., which several papers read as follows:

$1 67 int.
167 50

$169 17 NEW YORK, *Apr.* 20, 1875.

Two months after date, without grace, I promise to pay to the order of the Knickerbocker Life Insurance Company, one hundred
sixty-seven and $\frac{50}{100}$ dollars, with int. at 6 per cent., value re-
61 ceived in premium on policy No. 2,245 | 16,822, which policy
is to be void in case this note is not paid at maturity according to contract in said policy.

Due June 20. JESSE O. NORTON.

(Endorsed:) Pay to the order of C. C. Frary, clerk. For collection. Geo. Spriflen, secretary.

2 51 int.
$167 50

170 01 NEW YORK, *Apr.* 20, 1875.

Three months after date, without grace, I promise to pay to the order of the Knickerbocker Life Insurance Company, one hundred sixty-seven and $\frac{50}{100}$ dollars, with interest at 6 per cent., value received in premium on policy No. 2,245 | 16,822, which policy is to be void in case this note is not paid at maturity according to contract in said policy.

Due July 20. JESSE O. NORTON.

(Endorsed:) Pay to the order of C. C. Frary, clerk. For collection. Geo. Spriffen, secretary.

62 KNICKERBOCKER LIFE INSURANCE COMPANY,
No. 239 Broadway, N. Y.,
AGENCY AT CHICAGO, *July* 8, 1875.

Knick'r Life Ins. Co., New York.

GENTS: Mr. Jesse O. Norton, No. 2,245 | 16,822, says he cannot pay note for $169.17, due June 20th, at present, and would like to have time extended to July 25th, at which time he will pay the above and the one due on the 20th inst. Will you give him the desired time? Yours truly,

CHAS. C. FRARY.

(Copy.) KNICKERBOCKER LIFE INSURANCE COMPANY,
239 Broadway,
NEW YORK, *July* 12*th*, 1875.

Chicago Office Knickerbocker Life Ins. Co.

Yours of the 8th inst. received, requesting a further extension upon the payment of Jesse O. Norton, No. 16,822, due June 20th. Please return immediately all the papers and vouchers connected with this policy, as we cannot grant any further extension on the payments.

The premium note of Pillsbury, No. 10,046, is $174.39, to which add premium, $134.10, makes total payment $308.40. The dividend of 1875, $12.39, can be applied toward payment.

63 Truly yours,
(Signed) J. A. NICHOLS, *Pres't.*

KNICKERBOCKER LIFE INSURANCE CO.,
Renewal No. 158,589. No. 239 Broadway,
Premium, $385.00. NEW YORK, *April* 20, 1875.

Policy No. 2,245 | 16,822, issued in favor of Phebe A. Norton, is hereby considered in force for twelve months from this date, to wit, until the twentieth day of April, 1876, at noon, subject to and upon the express condition that if any note or other obligation

given for any portion of the premium due this day upon said policy, together with the interest on any loan, note, or other obligation for premium thereon, shall not be paid on the day when the same shall become due and payable, then and from thenceforth said policy and this continuation thereof shall immediately cease and become void, without notice to the insured or insurer, or any party or parties interested therein.

J. A. NICHOLS, *President.*

GEO. SPRIFFEN, *Secretary.*

64 The testimony here closed, the foregoing being all the evidence given upon the trial.

Thereupon the court made the following statement in the presence of the jury:

"As the case now stands, I will say to the jury that they should disregard so much of Mr. Randall's testimony as tends to show the conduct of the defendant and the plaintiff in regard to former payments, or, in other words, what I mean is, that each of these instalments, as they became due, must stand upon their own merits, and that transactions giving special indulgence on former payments are not to be considered as bearing upon any claim of indulgence on payments now under consideration.

But so much of Randall's and Frary's testimony as tends to show the powers of the agents in reference to giving extensions for the defendant on premiums or premium notes I shall allow to stand, because that will be properly a question of fact to go to the jury under the instructions of the court, but the dealings of Judge Norton with the defendant, in reference to indulgences which were granted him on former instalments, I shall exclude from the jury.

The counsel for the defendant still insisting upon the objections to the evidence referred to by the court, and excepting to that portion of this statement or direction to the jury thus made,

65 which left the evidence objected to to the jury for their consideration, and relating to the supposed powers of the agent, as incompetent for any purpose in the case.

After the arguments of counsel to the jury, the following charge was delivered by the court to the jury:

GENTLEMEN OF THE JURY: This suit is brought to recover the amount of the policy issued by the defendant upon the life of Jesse O. Norton, the plaintiff's husband. The policy bears date the second day of April, 1874, and by it the defendant in substance and effect agrees to pay the sum of ten thousand dollars to the plaintiff within three months after the proof of the death of her said husband. This policy is conditioned for the payment of an annual premium of three hundred and eighty-five dollars on the 20th day of April in each year, and can only be kept alive and in force by such payment.

It is admitted that a policy of like tenor to this now before us was issued by the defendant on the 20th of April, 1867; that said policy became defaced and nearly destroyed by fire in the fall of 1871, and the original policy was, by consent, surrendered and the new one, now in suit, substituted in its place, so that the contract under which the plaintiff claims really dates from April 20, 1867, instead of April 20, 1874.

It is also admitted that all the premiums were duly paid
66 and the policy kept in force up to the 20th of April, 1875.

It is further admitted that Mr. Norton died on the 3d or 4th of August, 1875, and that the defendant has waived the preliminary notice and proof of death required by the express terms of the policy.

The defendant resists this claim upon the ground that the premium which fell due on the 20th of April, 1875, has not been paid, and that in consequence of such non-payment the policy had become forfeited and void at the time of the death of the assured.

It is admitted that on the 20th of April, 1875, Mr. Norton paid to the proper agent of the defendant in this city the sum of fifty dollars to apply on the renewal premium due that day, and gave to the defendant his two promissory notes of $167.50 each, payable respectively in sixty and ninety days from said date.

And it is also admitted that it was in accordance with the usage and rules of said company to take such notes in settlement of its premium. That is to say, when a premium became due the company, instead of exacting the money on the 20th of April, authorized their agent to accept the notes of the assured payable at a future day; so that if the notes had been paid at maturity it would have been a good compliance with the terms of the policy and kept it alive. So that the questions arise in this case not from
67 the fact that the notes were taken for the April premium, but from the fact that the notes were not paid according to their terms.

I have already said this policy is conditioned upon the payments being made of this annual premium. It is the undoubted right of an insurance company to stipulate that its liability shall depend upon a strict compliance by the assured with the terms of the contract. The contract of assurance is one by which the company agrees, for the payment of a small sum, to become liable for the payment of a large sum, and it has the right to insist upon a strict compliance with the terms and conditions of its contract, unless those terms and conditions are waived by the company, which waiver the company has the right to make. This policy contains special clauses bearing upon the necessity of prompt payment of the premiums. I read you one of those clauses, and in fact, the main one:

"If said premium shall not be paid on or before twelve o'clock noon on the day or days above mentioned for the payment thereof at the office of the company in the city of New York, unless other-

wise expressly agreed in writing, or to agents, when they produce receipts signed by the president or secretary, or if the principal of or interest upon any note or other obligation given for the premium upon said policy shall not be paid at the time when
68 the same shall become due and payable, then and in every such case the company shall not be liable to pay the sum assured, or any part thereof, and said policy shall cease and be null and void without notice to any party or parties interested therein, except that the stipulation for a new policy hereinbefore provided shall remain in force."

Here you see that this clause expressly provides for the forfeiture of the policy in case of a failure to pay the premium at the time appointed, or in case of a failure to pay any notes which may be given for the premium.

By the fifth clause it is provided: "In case the said company shall at any time accept a payment of the premium on this policy after the same shall, by the terms thereof, become due and payable, such acceptance shall not in any respect be deemed to enlarge the time for the payment of premiums thereafter to become due on this policy, or be deemed any evidence of a usage of said company to accept payment of premiums after the same become due and payable."

By the renewal receipt which was given to the assured on the 20th April, 1875, it is provided:

"Policy No. 16,822, issued in favor of Phœbe A. Norton, is hereby continued in force for twelve months from this date, to wit,
69 until the 20th day of April, 1876, at noon, subject to and upon the express condition that if any note or obligation given for any portion of the premium due this day upon said policy, together with the interest or any like note or other obligation for premium thereon, shall not be paid on the day when the same shall become due and payable, then and from thenceforth said policy and this continuation thereof shall immediately cease and become void without notice to the insured or insurer or any parties interested therein."

By the notes which were given by Judge Norton, dated the 20th of April, for this premium, to which I have already alluded, it is provided: "Value received—premium of policy No. 2,248 | 16,822, which policy is to be void in case this note is not paid at maturity, according to contract in said policy."

So you see, gentlemen, that the provision for exacting a strict compliance with the terms of the policy, so far as the payment of the premium is concerned, is carried forward, not only into the policy, but into the renewal receipt, and into the notes given for the payment of the premium. If Judge Norton had died between the 20th of April and the time these notes matured, there would have
70 been no question but what the policy would remain in force, because the taking of the notes is an extension to the extent

of the terms of the notes themselves of the time for the payment of the April premium.

I have already said it was in the power of the company to insist upon a strict payment of this premium at maturity, or it might waive such conditions.

The plaintiff contends that this condition of strict and punctual payment of these notes was waived by the defendant, and thereby the alleged forfeiture has been avoided. During the trial the plaintiff offered evidence tending to show that there had been a usage on the part of the defendant to give Judge Norton time upon the payment of his premium notes, after they became due, and insisted that by the course of dealing between himself and the company he had been led to expect indulgence in the payment of these notes beyond the time when they respectively fell due.

I allowed this testimony to be given, reserving the right to exclude it from the consideration of the jury, if, on reflection, I should think it inadmissible for any reason.

I am now of the opinion that this testimony ought not to be admitted, and therefore instruct you to disregard it, except so far as it bears upon the duties and powers of the agents with whom Judge Norton dealt.

The only question of fact in this case to be passed upon by
71 you is, Did the defendant waive the strict payment of these notes at maturity? It was in the power of the defendant to waive this payment.

The question for you to pass upon in the light of the evidence is whether such waiver was in fact made.

The plaintiff has given proof tending to show that the defendant's agent had some discretionary power in regard to accepting the payment of notes after maturity, and the first question you have to solve is, Had the agent of the defendant here the right to waive a strict compliance with the terms of the agreement? I repeat it, the first question you have to solve here is, "Had the agent of the defendant here the right to waive a strict compliance with the terms of the agreement?" That is to say, it is for you to find from the proof what power in the matter of waiving a forfeiture was vested in the defendant's agents here. If you find that they were clothed with the right to waive a forfeiture, then the second enquiry will be, Was such waiver in fact made? That is to say, this is to be determined by you from the testimony in the case, and by a fair and full consideration of the testimony. The evidence of Mr. Randall shows, and is not disputed in that regard, that he was in the defendant's employ here from 1868 to 1874. In the earlier years he acted as cashier and book-keeper, and in the later years as manager of the defendant's business at this point. He has de-
tailed to you his mode of doing business, the manner in which
72 he made and remitted collections, and it is for you to say, from the proof, what was the extent of his power or direc-

tion in the matter of waiving a strict payment on the notes given for the payment of premiums or in the payment of premiums themselves. I should also say here that the power vested in Mr. Randall is only pertinent and material to be considered by you so far as it tends to throw light upon the powers which were vested in his successor, Mr. Frary, and who was the defendant's agent at the time of the transaction in question now.

You have also heard the testimony of Mr. Frary, the successor of Mr. Randall, as defendant's agent here, as to his power and duty as such agent, and his mode of doing business, and you must find and decide from the evidence whether he had power to waive a forfeiture or indulge parties in the payment of premiums or notes given for premiums after such notes or premiums had become due, and whether he did, in accordance with his power as defendant's agent, extend the time for the payment of the notes in question given for the April premium of Judge Norton's policy.

If you are satisfied, from the evidence in the case, that Mr. Frary, the defendant's agent here at the time the notes in question became due, had the power to extend the time of payment or to give
73 indulgence on such notes, and that he did so extend the time for the payment of said notes until the 20th of July, and before the expiration of said extension Mr. Norton offered to pay said notes, and that the defendant refused to accept such payment, then the defendant is liable on this policy.

The burden of proof that the waiver was made, and that the agent who made it had authority to make it, is upon the plaintiff, and the plaintiff is bound to make out her case on this point by a preponderance of proof.

Where there is a conflict of testimony between witnesses it is for you to determine which you will believe—that is, the law makes you the judges of the credibility of the witnesses.

If you find the issues for the plaintiff, the measure of damages will be the amount of this policy of ten thousand dollars, less the two notes which remain unpaid for the April premium, and interest upon the balance at six per cent. after three months from the death of Judge Norton.

The counsel for the defendant then and there duly excepted—

First. To that portion of the foregoing charge of the court wherein the court submitted to the jury the question of fact as to whether Charles C. Frary, the agent of the defendant, had authority
74 from the defendant to grant the extension claimed to have been granted after the forfeiture of the policy, on the ground that there was no evidence legally tending to establish such authority or competent or sufficient for the purpose proper for the consideration of the jury.

Second. The counsel for the defendant then and there duly excepted to that portion of the charge wherein the court submitted for the determination of the jury the question whether there was in

fact an actual extension given by the defendant to Norton, the assured, waiving the forfeiture, claiming that there was no evidence showing or tending to show any valid or legal extension or any extension in fact given for any consideration whatever by said defendant or by its authority.

Third. The counsel for the defendant also then and there duly excepted to that portion of the charge of the court relating to the power and authority of the agent to grant the extension named, in which, speaking of the power of Randall in the premises, the court uses the following language, namely: "It is for you to say, from 'the proof, what was the extent of his power or discretion in the 'matter of waiving a strict payment on the notes given for the pay-'ment of premiums themselves."

And the defendant excepted also to that portion of the charge which states to the jury that the power vested in Randall is
75 "pertinent and material to be considered by you, so far as 'it tends to throw light upon the powers which are vested in 'his successor, Mr. Frary."

The defendant's counsel also then and there duly excepted to that portion of the charge in which the court stated to the jury, as follows:

"You have also heard the testimony of Mr. Frary, the successor 'of Mr. Randall, as defendant's agent here, as to his power and 'duty as such agent, and his mode of doing business, and you must 'find and decide from the evidence whether he had power to waive 'a forfeiture or indulge parties in the payment of premiums or 'notes given for premiums after such notes or premiums had 'become due."

The counsel for the defendant also then and there duly excepted to that portion of the charge of the court in which he states to the jury:

"If you are satisfied, from the evidence in the case, that Mr. 'Frary, the defendant's agent here, at the time the notes in ques-'tion became due, had the right to extend the time of payment or 'to give indulgence on such notes, and that he did so extend the 'time for the payment of such notes until the 20th of July, and 'that before the expiration of said extension Mr. Norton offered to 'pay said notes, and that the defendant refused to accept
76 'such payment, then the defendant is liable on this policy."

The counsel for the defendant thereupon requested the court to give the following instructions to the jury; numbered respectively, first, second, third, fourth, fifth, and sixth:

First. That the failure on the part of Jesse O. Norton, the holder of the policy in this case, to pay the premium note maturing June 30th, 1875, if such was the fact as shown by the evidence, operated as matter of law to release the liability of the insurance company upon the policy in question, and in such case no recovery can be

had thereon, unless a valid extension has been shown and the right of action upon the policy revived thereby.

Second. That if, after the failure to meet the premium note at maturity, and the forfeiture of all right to recover upon the policy thereby, if the evidence establishes such failure, Frary, the clerk or agent of the company, stated to the son or agent of Judge Norton, the policy holder, that the note might lie over, or when applied to for an extension, said it was all right, this would not create, in law, any binding or valid agreement for an extension, unless said clerk or agent was authorized by the company to make such an extension.

Third. Such a statement by the clerk, even if authorized, could not, in law, revive the policy or give a right of action upon
77 it, unless, in addition, the premium or some other consideration was actually paid and accepted.

Fourth. The jury are instructed, as matter of law, that a clerk or agent authorized to collect premiums and remit the same to the company and keep their books, would not, by that relation, be clothed with power to extend time for payment on the premium-note and revive a right of action upon the policy after the same had become forfeited by non-payment of the premium note at maturity.

Fifth. The jury cannot give any effect to the act of the clerk in giving an extension, if they believe that he did in fact give such extension after the forfeiture of the policy, without some sufficient proof that he was authorized by the company to give the extension.

Sixth. A promise to extend the payment of the premium note, or statement that it would be extended after the policy had been forfeited for non-payment, would be inoperative in law, and could not bind the company, unless made upon some good consideration paid, such as the actual acceptance of the premium or some other valuable consideration from the policy holder, and accepted by the company.

Each and every of said several instructions which the defendant's counsel requested the court to give to the jury the court re-
78 fused to give to the jury, and to each refusal of the court to give each several instruction so asked, the counsel for the defendant then and there separately and severally objected and excepted.

Counsel for the defendant thereupon again requested the court to direct the jury to find a verdict for the defendant, which the court refused to do, to which refusal of the court the counsel for the defendant then and there duly excepted.

The jury retired to consider of their verdict, and, after considering the same, returned a verdict for ten thousand three hundred and nine dollars and thirty-three cents.

Defendant thereupon moved for a new trial, which said motion is set out at page of this record.

After hearing the same and arguments thereupon, the court overruled said motion and rendered judgment upon said verdict. To

which ruling of the court the counsel for the defendant then and there duly excepted.

And because none of the said exceptions so offered and made to the opinion and decision of the said circuit judge do appear upon the record of the said trial, therefore, on the prayer of said defendant, by its counsel, the said circuit judge hath to this bill of exceptions put his seal, according to the statute in such case made
79 and provided, this day of , A. D. 1877.

The testimony has been substantially all set forth as above, for the reason that deft.'s counsel thought their motion for judgment for deft. in the nature of a demurrer to evidence.

H. W. BLODGETT, *Judge.* [SEAL.]

The foregoing bill of exceptions is agreed on as satisfactory. Jany. 31st, 1877.

CRAWFORD AND McCONNELL.
MILLER AND FROST.

(Endorsed:) Filed Jany. 10, 1877. Wm. H. Bradley, Clk.

And afterwards, to wit, on the 23d day of January, A. D. 1877, said defendant filed in said clerk's office their bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

PHŒBE NORTON
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY.

Know all men by these presents, that we, the Knickerboker Life Insurance Company, of the city and State of New York, and
80 Charles A. Coe, of the city of New York, and Alexander Studwell, of the city of Brooklyn, New York, are held and firmly bound unto Phœbe Norton, of the county of Cook, and State of Illinois, in the sum fifteen thousand dollars, to be paid to the said Phœbe Norton, her executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this sixteenth day of January, A. D. 1877.

Whereas, the above named, the Knickerbocker Life Insurance Company, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Circuit Court of the United States for the Northern District of Illinois; now, therefore, the condition of this obligation is such that if the above named, the Knickerbocker Life Insurance Company, shall prosecute its said writ of error to effect

and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

KNICKERBOCKER LIFE INS. CO., [SEAL.]
By J. A. NICHOLS, *President.*
CHARLES A. COE. [SEAL.]
81 A. STUDWELL. [SEAL.]

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF NEW YORK AND SECOND CIRCUIT. } *ss.*

On this 16th day of January, A. D. 1877, personally appeared before me the above named Charles A. Coe and Alexander Studwell, by me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged the execution thereof.

R. E. STILWELL,
U. S. Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK AND SECOND CIRCUIT. } *ss.*

Charles A. Coe and Alexander Studwell, being severally sworn, each for himself doth depose and say, that he is a resident and freeholder within the State of New York, the said Coe of the southern district of New York, and the said Alexander Studwell of the eastern district of New York, and that he is worth the sum of thirty thousand dollars, over and above all his just debts and liabilities which he owes or has incurred, and in property not exempt from execution.

CHARLES A. COE.
A. STUDWELL.

82 Sworn to, this 16th day of January, A. D. 1877, before me.

R. E. STILWELL,
U. S. Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK. } *ss.*

On this 16th day of January, 1877, personally appeared before me the above named J. A. Nichols, to me personally known, and known to me to be the president of the Knickerbocker Life Insurance Company, and who made oath that he executed the same for said company as such president, and that the seal of the said company hereto annexed is the corporate seal of the same, and that it was affixed hereto by authority of said company, and that he subscribed the same, and he acknowledged to me that he executed the within instrument for the purposes therein mentioned.

[SEAL.] R. E. STILWELL,
U. S. Commissioner for the Southern District of New York.

(Endorsed:) Approved. H. W. Blodgett, Judge. Filed January 23, A. D. 1877. Wm. H. Bradley, Clerk.

83 NORTHERN DISTRICT OF ILLINOIS, *ss.*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Phœbe A. Norton is the plaintiff and the Knickerbocker Life Insurance Company is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 8th day of September, A. D. 1877, and of our independence the one hundred and second year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

84 UNITED STATES of AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } *ss.*

The United States of America to the judges of the Circuit Court of the United States for the Northern District of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between Phœbe A. Norton, plaintiff, and the Knickerbocker Life Insurance Company, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said the Knickerbocker Life Insurance Company, as by its complaint appears, and it is being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1877, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirtieth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, and of the independence of the United States the 101st year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Endorsed:) Supreme Court of the United States. Knickerbocker Life Insurance Co., plff. in error, vs. Phœbe A. Norton, deft. in error. Writ of error.

85 UNITED STATES OF AMERICA, *ss.*

To Phæbe Norton, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1877, next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Northern District of Illinois, wherein The Knickerbocker Life Insurance Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 10th day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

H. W. BLODGETT, *Judge.*

Due and timely service of the within citation accepted, this 5th day of February, A. D. 1877, by a copy thereof.

CRAWFORD & McCONNELL,
Plaintiff's Attorneys.

(Endorsed:) 915. United States circuit court. Norton vs. Knickerbocker Life Ins. Co. Citation.

86 UNITED STATES OF AMERICA.

In the Supreme Court of the United States. October Term, A. D. 1877.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
PHŒBE NORTON, DEFENDANT IN ERROR.

And now comes the plaintiff in error by Miller & Frost, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The court erred in refusing to instruct the jury on each of the several points in regard to which instructions were asked by the defendant, and as asked by the defendant.

2. The court erred in his charge and instructions to the jury.

87 3. The court erred in refusing to give each several instruction asked by the defendant, and numbered respectively, one, two, three, four, five, and six, and in refusing to give either of said instructions.

4. The charge to the jury was erroneous in regard to the question of the extension of payment on the premium notes, and to the evidence necessary and proper to establish such extension.

5. The court erred in allowing the evidence of Randall and the other evidence objected to by the defendant, to be admitted and considered by the jury.

6. The court erred in refusing to allow the motion to strike out the testimony of Randall as to the usage and practice of Randall while acting as agent for the defendant, in retaining and collecting premium notes after due.

7. The court erred in allowing any evidence touching the usage and practice of the company or its agents upon the subject
88 of retaining premium notes and collecting them after they had matured.

8. The court erred in allowing any proof of extension under the declaration.

9. The court erred in refusing to direct the jury to find a verdict for the defendant.

The plaintiff in error, therefore, prays that said judgment be reversed.

MILLER & FROST,
for Plaintiff in Error.

(Endorsement on cover:) N. Illinois C. C. U. S. No. 745. The Knickerbocker Life Insurance Company, plaintiff in error, vs. Phœbe A. Norton. Filed 15th September, 1877.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1877.

No. 745.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

—VS.—

PHŒBE A. NORTON, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief and Argument on Behalf of the Plaintiff in Error.

MILLER & FROST,
ATTORNEYS FOR PLAINTIFF IN ERROR.

CHICAGO
Beach, Barnard & Co., Legal Printers, 104 Randolph Street.
1877.

IN THE

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OCTOBER TERM, A. D. 1877.

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PLAINTIFF IN ERROR,

—VS.—

PHŒBE A. NORTON, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief and Argument on Behalf of the Plaintiff in Error.

I.

STATEMENT OF THE CASE.

This case is brought here by writ of error to the Circuit Court of the United States for the Northern District of Illinois.

Phœbe A. Norton commenced an action against the plaintiff in error in the Superior Court of Cook County, Illinois, which was removed into the Federal Court, and the declaration was filed in that court, April 21, A. D. 1876. The action is upon a policy of insurance issued by the Insurance

Company upon the life of Jesse O. Norton, for ten thousand dollars, payable to his wife, the defendant in error. Norton died August 3d, 1875, and the action is to recover the amount of the insurance.

The policy is dated April 2nd, 1874, and was given in the place of a similar policy issued by the Company in 1867, and destroyed or injured by the fire of October 9th, 1871. In it, the Company, in consideration of the premium of $385, "and of the premium of a like sum, to be paid "on or before the 20th day of April of every year during "the continuance of this policy" insures the life of Jesse O. Norton, "subject to the clause written on the back, "which forms a part and parcel hereof."

The policy contains the following clause:

"If the said premium shall not be paid on or before 12 "o'clock noon, on the day or days above mentioned for "the payment thereof, at the office of the Company in the "City of New York, (unless otherwise expressly agreed "in writing,) or to agents when they produce receipt, "signed by the president or secretary, or if the principal "or interest upon any note or other obligation, given for "the premium upon said policy, shall not be paid at the "time the same shall become due and payable, then and "in every such case, the Company shall not be liable to "pay the sum assured, or any part thereof, and said policy "shall cease and be null and void, without notice to any "party or parties herein."

Also the following clause:

"In case the said Company shall at any time accept a "payment of the premium on this policy, after the time "the same shall by the terms hereof become due and pay-"able, such acceptance shall not in any respect be deemed "to enlarge the time for the payment of premiums there-"after to become due on this policy, or be deemed any "evidence of a usage of said Company to accept payment

" of premiums after the same becomes due and payable."

The following statement was also annexed to and made a part of the policy :

" Agents of the Company are not authorized to make, " alter or abrogate contracts, or waive forfeitures."

It is alleged in the declaration that Jesse O. Norton died in Chicago, August 3, 1875, and that the Company waived proof of death, &c., and refused to pay the insurance.

It is also alleged in the declaration that the plaintiff and the insured " have in all things conformed themselves to, " and observed all and singular the said conditions, agree- " ments, matters and things by them or either of them to " be observed and performed, according to the form and " effect of said policy of insurance."

A plea of the general issue was filed in behalf of the defendant at the May Term, A. D. 1876. Also a special plea setting forth the provision in the policy above recited, respecting the payment of premiums and premium notes, and averring that at the time of issuing said policy of insurance, and to secure payment of a portion of the annual premium therefor, the said Norton gave to the defendant his two several promissory notes, dated April 20th, 1875, one for $167.50, payable two months after date without grace, with interest at six per cent. per annum, and one for $167.50, payable three months after date without grace, with interest at six per cent. per annum; that said note was given on account of the premium in said policy, and that it was written in each of said notes that said policy would be void in case said note was not paid at maturity, according to the contract in said policy. That both of said notes matured and became due and payable long before the death of said Norton. But the said plaintiff did not, nor did the said Norton, nor any person for or in behalf of said plaintiff or said Norton, pay the said notes or either of them, nor has the said plaintiff or said Norton, nor any one

in behalf of either of them, paid the said promissory notes or either of them or any portion thereof, nor the said premium, or any portion thereof, so secured by said promissory notes, or any portion thereof, by means whereof said policy became and was wholly void and of no further force or effect.

To this plea the plaintiff replied, first, that the defendant by its duly authorized agents extended the payment of first note to the 20th of July, 1875, at which time plaintiff tendered the amount of said note, but defendant refused to receive it. And as to the second promissory note, defendant notified plaintiff on the 15th of July, that it would not receive it, and although plaintiff tendered the amount of said note before the same was due, yet defendant refused to receive the same, and secondly, after the maturity of the first note, to wit, on the 10th of July, 1875, defendant by its duly authorized agent, waived all advantages said defendant might have claimed because of the nonpayment of said note, and extended the payment thereof to the 20th of July, 1875, at which time plaintiff tendered to said agent the amount due upon said note, but said agent, in pursuance of instructions received from said defendant, refused to accept the same, and notified plaintiff that defendant would recognize no further liability upon said policy, and as to the second of said notes, plaintiff on the 15th of July, and again at the maturity thereof, tendered to said defendant the amount thereof, but defendant refused to receive the same. Issue was joined upon these replications. The case was tried by a jury at the November Term of the Court, A. D. 1876.

George C. Randall testified in behalf of the plaintiff, and said he was at one time connected with the defendant as cashier and bookkeeper in Chicago, and afterwards as manager. That his connection commenced in September, 1868, and terminated in March, 1874. He was then asked

the following question: "Do you remember how Judge "Norton ordinarily paid his premiums?" Counsel for the defendant objected to this question as immaterial and incompetent. The Court overruled the objection, and the counsel for the defendant duly excepted. The witness answered: "He paid some money down, and gave notes. "Sometimes he would give them at 30, 60, or 90 days, "one or more notes; sometimes one note, sometimes "more; I don't recollect exactly. He paid some money "down, and gave notes. Sometimes one note, some-"times two notes. These notes would run 20, 60, and 90 "days, and sometimes longer than that. I think on one "occasion he gave one less than 30 days, and one in six "months, for the balance of the premium. These notes "which were given to the company for these premiums "were sent to me for collection. I collected them through "my office." Witness was then asked the following question: "Did Judge Norton pay these notes given for "premiums upon the day they became due?" To this question defendant's counsel objected. The Court overruled the objection, and defendant's counsel duly excepted. The witness then answered as follows: "No, sir; he "did not. He was a very slow payman—either hard up "or very careless about the payment of his premiums. "Sometimes he went a few days, and sometimes even "several weeks before he paid these notes after they be-"came due."

Witness was then asked the following question: "Will "you state now whether or not the officers of the com-"pany were acquainted with the fact that you extended "these indulgencies?"

To which interrogatory the counsel for the defendant then and there objected to, as immaterial and incompetent. The Court overruled the objection. To which ruling of the Court the counsel for the defendant then and there duly excepted.

The witness then answered as follows: "They were "aware of it in this manner; that when a premium was "collected, it was my duty to report it at the end of the "month to the company, and pay the money over. If it "was not paid, I retained the note, and if it was paid, I "reported it to the company. If it was not reported in the "next report following payment, and the collection was "due, it would follow, of course, that it was not paid. "If it was paid, I reported it in the next report." The witness, in this connection, said that the company issued a policy to Judge Norton in 1867, which was nearly destroyed in the fire of 1871, and that the policy in suit was issued in place of it. On his cross-examination, the witness said that the only knowledge the company had upon the subject of the premiums not being paid, was that the company did not get the money when it should have been paid. That he never reported any delinquency of Judge Norton to the home office, nor had any correspondence with the home office, or any members of the company, on the subject. Witness was then asked, in behalf of the plaintiff, the following question: "What time did the "company allow you to keep notes that were sent for col-"lection before you made returns upon them?" To this question counsel for defendant then and there duly objected. The objection was overruled, the Court stating that the witness could answer whether they had any usage or rule upon that subject. To this ruling counsel for the defendant duly excepted, and the witness answered as follows: "We were, I believe, at first allowed to retain "them 90 days. Afterwards that time was reduced to "60, and afterwards to 30 days. But at first, during the "first few years of my connection with the company, we "were allowed to retain the collections for 90 days. After-"wards, during the latter part of my connection, it was "reduced to 60 days, and during the last six months, to "30 days. We were allowed to retain the renewal and

" notes for collection that time before transmitting them to " the home office. The moment the money was paid we " forwarded the money. We were required to make re- " ports to the company every month; during the last six " months, every 10 days, required to report and trans- " mit the moneys collected. I kept the notes that were " not paid till the time had expired that I was allowed to " retain them. I reported the amount of money, itemized " them, gave the number of the policies, the names of the " parties insured, the number of the renewal, the amount " of money collected, and other details. Premiums un- " paid I retained, and did not say anything about. We " were authorized to retain at first for 90 days. We were " required to report simply the premiums that were paid; " that is all."

Charles C. Frary next testified in behalf of the plaintiff, and said he was a clerk in defendant's office in Chicago, and had been a year and ten months. Counsel for the plaintiff then asked the witness the following question: " How long are you allowed to keep a collection; I mean " to say, a note which has been sent to you for collection, " in your hands?" Counsel for defendant objected to this question as incompetent and immaterial. The Court overruled the objection, stating as follows: " You can " ask him how long he was allowed at the time this al- " leged default occurred, you can ask what the usage " was at the time this alleged extension was made." To this ruling counsel for the defendant duly excepted, and the witness answered: " I, as a general thing, waited for " instructions to return, but I always returned on or before " the 15th of the month, after they were due; that is, if " they were due in November, I returned them on or " before the 15th of December — all of them; and any " time before that time I accepted the payment of the " notes, even after they were due, upon a medical exami- " nation and satisfactory proof of the parties' good health."

The witness further stated that on July 8th Judge Norton's son made an application to have the time extended, but the witness told him he could not give him the extension without instructions of the company. That he would write to the company in regard to it. That he did write. The following is the correspondence between the witness and the company, found on page 31 of the printed record:

" KNICKERBOCKER LIFE INSURANCE COMPANY, No. 239 }
" Broadway, N. Y., Agency at Chicago, July 8, 1875. }

" *Knickerbocker Life Ins. Co., New York:*

" GENTS: Mr. Jesse O. Norton, No. 2,245, 16,823, " says he cannot pay note for $160.17, due June 20th, at " present, and would like to have time extended to July " 25th, at which time he will pay the above, and the one " due on the 20th inst. Will you give him the desired " time?

" Yours, truly,
" CHAS. C. FRARY."

" KNICKERBOCKER LIFE INSURANCE COMPANY, }
" 239 Broadway, New York, July 12th, 1875. }

" *Chicago Office Knickerbocker Life Ins. Co.:*

" Yours of the 8th inst. received, requesting a further " extension upon the payment of Jesse O. Norton, No. 16,- " 822, due June 20th. Please return immediately all the " papers and vouchers connected with this policy, as we " cannot grant any further extension on the payments.

" The premium note of Pillsbury, No. 10,045, is $174.- " 30, to which add premium $134.10, makes total payment " $308.40. The dividend of 1875, $12.30, can be applied " toward payment.

" Truly yours,
" J. A. NICHOLS, *Pres't.*"

On the 15th the witness says he saw Judge Norton's son, told him the result, and after this payment of the note was offered and declined by the witness.

The next witness in behalf of the plaintiff was Martin Norton, who said that he went to the office of the company in Chicago some time after the first note was due, and the following conversation occurred between him and Mr. Frary, the agent of the company: "I told him that I "wanted to get this note extended until the 20th of July, "and he said he could not—something about he could not "do it. I told him: 'why,' says I, 'Judge Norton told me to "'come over here and tell you that he would pay this note "'on the 20th of next month, and it would be all right,' "and then he says, 'Oh, Judge Norton!' and then he "said to me: 'Tell the Judge it is all right.'" The witness further said that on the 7th or 8th of July his father received notification that another note would be due on July the 20th, and his father told him the next morning to go and tell the agent that he was not very well, and would be down, probably, in a week, or it might be he would not be down for two weeks, and it would accommodate him to have this note extended so as to make it due about the 10th of August, and the witness says: "I went to the agent "and told him what father said, and he said he had no "power to extend this note any further. He had done all "he could, he said; he had settled the premium up by "notes, &c., and he had given as much time as he could— "something to that effect—and he would have to write to "the company. That was a few days after the 4th, I "think—probably the 7th or 8th. I told father of it, that "evening when I went home.

"On, I think, the 13th of July, father told me to get the "money and pay up both notes. I went down to the "Knickerbocker office and saw the agent. I told him that "I had concluded to pay those notes, and that I wished to "get the exact amount that was due, and I would pay both "notes and have it closed up; so he got the notes out. I "asked Frary the amount of these notes, and he gave it "to me on a piece of paper. I told him I would pay to-

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" morrow or next day, and he gave me the figures, the
" amount of the notes, but whether it was to that day, or
" whether it was to the 15th, the day that I did offer to pay
" it, I don't know. I told him I would pay to-morrow or
" next day—that would be the 14th or 15th—and I took
" the amounts. I don't know exactly what his remark
" was, but the substance was, it was all correct. Whether
" he said 'yes,' or what he said, I don't remember. He
" gave me the amounts that would be due: that was the
" understanding I had. I gave the amounts to father,
" showed him the paper with the amounts on, and he told
" me to go down to Mr. Goodell, the president of the
" Fourth National, and see him about it, and get the money
" to pay it. I went there the next day. I disremember
" how it was that I did not get the money that day—I
" think Mr. Goodell was not there. That was on the 14th.
" I went there the next morning, and Mr. Goodell told me
" that it was all right—to send the checks up to father to
" sign them. I sent the checks up, and this was sent back
" with father's signature and with the amounts filled in,
" and then I went right over to the Knickerbocker Life
" and offered payment, or I told them that I came over to
" pay those notes—I would take them now—something to
" that effect. He then replied that he had received a tele-
" gram from New York the night before, and that he had
" sent them off—he had sent them to New York: that he
" had come over to my office—I was right across the street:
" that he came over to my office the night before, but he
" did not find me in: and I told him that was not right:
" that I did not consider that that was the way to do busi-
" ness. He said it was rather bad: he said he could do
" nothing at all. I offered to pay him, and he would not
" take it. I then went to Mr. Goodell and told him
" about it, who told the teller of the bank to give me legal-
" tender notes for the amount of the first note. I took the
" legal-tender notes and went over there and tendered them

"and demanded the notes, and he refused. He said he "hadn't the notes; told me the same thing he did before— "that he had sent both notes to New York."

This was substantially all the testimony given on behalf of the plaintiff, and the plaintiff's case was here rested. Counsel for the defendant thereupon moved to strike out that portion of the testimony of Geo. C. Randall, and of the witness, C. C. Frary, touching the usages of the company as to non-payment of prior premium notes by Norton, and prior indulgence thereon to Norton, on the ground that such evidence was not competent or material in the case—that it conflicted with the terms of the policy, and did not legally show, or tend to show, any authority in Frary to give the alleged extension, and also upon the ground that the extension, if made, and assuming the statement of witness Norton to be correct, was without a consideration, and was made after the forfeiture had occurred, and that by the terms of the policy, and the notice accompanying the same, the agents of the company were not authorized to alter the contract or waive forfeitures. The Court declined to grant said motion, but stated that he would hold said matter under consideration until the proof was all in. Counsel for the defendant then moved the Court to strike out that portion of the testimony of Martin Norton relative to an agreement for an extension of the premium notes which said witness testified to having made with Frary, the clerk or agent of the defendant, upon the ground that such agreement was without authority on the part of said agent; that it was after the forfeiture had occurred, was without consideration, and wholly void. The Court overruled said motion; to which ruling of the Court counsel for the defendant then and there duly excepted. Defendant's counsel thereupon gave in evidence the premium notes set forth in the pleas, and found on pages 30 and 31 of the printed record.

The witness Frary was also recalled, and stated that he had never stated to the witness Norton [redacted] when he made an application for an extension of the note, that it would be all right. The following renewal of the policy was also put in evidence.

"Knickerbocker Life Insurance Co., No. 239 Broadway.

"NEW YORK, April 20, 1875.

"Renewal No. 158,589.

"Premium $385.00.

"Policy No. 2,245, 16,822, issued in favor of Phebe A. "Norton, is hereby continued in force for twelve months "from this date, to wit, until the twentieth day of April, "1876, at noon, subject to and upon the express condition "that if any note or other obligation given for any portion "of the premium due this day upon said policy, together "with the interest on any loan note, or other obligation for "premium thereon, shall not be paid on the day when the "same shall become due and payable, then and from "thenceforth said policy, and this continuation thereof "shall immediately cease and become void, without notice "to the insured or insurer, or any party or parties inter-"ested therein.

"J. A. NICHOLS, *President.*

"GEO. SPRIFFEN, *Secretary.*"

Upon this testimony the case was given to the jury. The court then stated to the jury as follows: "As the "case now stands, I will say to the jury that they should "disregard so much of Mr. Randall's testimony as tends "to show the conduct of the defendant and the plaintiff "in regard to former payments, or in other words, what "I mean, is that each of these installments as they become "due, must stand upon their own merits, and that trans-"actions giving special indulgence on former payments "are not to be considered as bearing upon any claim of "indulgence on payments now under consideration, but so "much of Randall's and Frary's testimony as tends to show

"the powers of the agent in reference to giving extensions "for the defendant on premiums or premium notes, I "shall allow to stand, because that will be properly a "question of fact to go to the jury under the instructions "of the court, but the dealings of Judge Norton with the "defendant in reference to indulgence, which were granted "him on former installments, I shall exclude from the jury." Counsel for the defendant duly excepted to that portion of the statement thus made to the jury, which left the evidence objected to to the jury for their consideration.

The court thereupon, among other things, charged the jury as follows: "The only question of fact in this case "to be passed upon by you is, did the defendant waive the "strict payment of these notes at maturity. It was in the "power of the defendant to waive this payment. The "question for you to pass upon in the light of the evidence "is whether such waiver was in fact made.

"The plaintiff has given proof tending to show that the "defendant's agent had some discretionary power in re- "gard to accepting the payment of notes after maturity, "and the first question you have to solve is: Had the "agent of the defendant here the right to waive a strict "compliance with the terms of the agreement? I repeat "it, the first question you have to solve here is, 'Had the "agent of the defendant here the right to waive a strict "compliance with the terms of the agreement?' That is "to say, it is for you to find from the proof what power "in the matter of waiving a forfeiture, was vested in the "defendant's agents here. If you find that they were "clothed with the right to waive a forfeiture, then the "second enquiry will be: Was such waiver in fact made? "That is to say, this is to be determined by you from the "testimony in the case, and by a fair and full consideration "of the testimony. The evidence of Mr. Randall shows, and "is not disputed in that regard, that he was in the defend- "ant's employ here from 1868 to 1874. In the earlier

"years he acted as cashier and bookkeeper, and in the "later years as manager of the defendant's business at "this point. He has detailed to you his mode of doing "business, the manner in which he made and remitted "collections, and it is for you to say, from the proof, what "was the extent of his power or discretion in the matter of "waiving a strict payment on the notes given for the pay- "ment of premiums, or in the payment of premiums them- "selves. I should also say here, that the power vested in "Mr. Randall is only pertinent and material to be con- "sidered by you, so far as it tends to throw light upon the "powers which were vested in his successor, Mr. Frary, "and who was the defendant's agent at the time of the "transaction in question now.

"You have also heard the testimony of Mr. Frary, the "successor of Mr. Randall, as defendant's agent here, as "to his power and duty as such agent, and his mode of "doing business, and you must find and decide from the "evidence whether he had power to waive a forfeiture, or "indulge parties in the payment of premiums or notes "given for premiums after such notes or premiums had "become due, and whether he did in accordance with his "power as defendant's agent, extend the time for the pay- "ment of the notes in question given for the April pre- "mium of Judge Norton's policy.

"If you are satisfied, from the evidence in the case, that "Mr. Frary, the defendant's agent here, at the time the "note in question became due, had the power to extend "the time of payment, or to give indulgence on such notes, "and that he did so extend the time for the payment of "said notes until the 20th of July, and before the expira- "tion of said extension, Mr. Norton offered to pay said "notes, and that the defendant refused to accept such pay- "ment, then the defendant is liable on this policy."

Counsel for the defendant duly excepted:

First. To that portion of the charge wherein the court submitted to the jury the question of fact as to whether Charles C. Frary, the agent of the defendant, had authority from the defendant to grant the extension claimed to have been granted after the forfeiture of the policy, on the ground that there was no evidence legally tending to establish such authority, or competent or sufficient for the purpose, proper for the consideration of the jury.

Second. To that portion of the charge wherein the court submitted for the determination of the jury the question whether there was in fact an actual extension given by the defendant to Norton, the insured, waiving the forfeiture, on the ground that there was no evidence showing, or tending to show, any valid or legal extension, or any extension in fact, given for any consideration whatever by said defendant, or by its authority.

Third. To that portion of the charge of the court relating to the power and authority of the agent to grant the extension named, in which, speaking of the power of Randall in the premises, the court uses the following language, namely: "It is for you to say, from the proof, "what was the extent of his power, or discretion, in the "matter of waiving a strict payment on the notes given "for the payment of the premiums themselves." And the defendant also excepted to that portion of the charge which states to the jury that "the power vested in Randall is "pertinent and material to be considered by you, so far as "it tends to throw light upon the powers which are vested "in his successor, Mr. Frary." Defendant's counsel excepted to that portion of the charge in which the court stated to the jury, as follows:

"You have also heard the testimony of Mr. Frary, the "successor of Mr. Randall, as defendant's agent here, as "to his power and duty as such agent, and his mode of

"doing business, and you must find and decide, from the "evidence, whether he had power to waive a forfeiture, "or indulge parties in the payment of premiums, or notes "given for premiums, after such notes or premiums had "become due."

Counsel for the defendant then and there excepted to that portion of the charge of the court which states to the jury, as follows:

"If you are satisfied, from the evidence in the case, that "Mr. Frary, the defendant's agent here, at the time the "notes in question became due, had the right to extend "the time of payment, or to give indulgence on such notes, "and that he did so extend the time for the payment of "such notes until the 20th of July, and that before the "expiration of said extension, Mr. Norton offered to pay "said notes, and that the defendant refused to accept such "payment, then the defendant is liable on this policy." Counsel for defendant thereupon requested the court to give the following instructions to the jury, numbered, respectively, first, second, third, fourth, fifth and sixth:

First. That the failure on the part of Jesse O. Norton, the holder of the policy in this case, to pay the premium note maturing June 20th, 1875, if such was the fact as shown by the evidence, operated as matter of law to release the liability of the insurance company upon the policy in question, and in such case no recovery can be had thereon, unless a valid extension has been shown, and the right of action upon the policy revived thereby.

Second. That if after the failure to meet the premium note at maturity, and the forfeiture of all right to recover upon the policy thereby, if the evidence establishes such failure, Frary, the clerk or agent of the company, stated to the son or agent of Judge Norton, the policy holder, that the note might lie over, or when applied to for extension, said it was all right, this would not create in law any

binding or valid agreement for an extension, unless said clerk or agent was authorized by the company to make such an extension.

Third. Such a statement by the clerk, even if authorized, could not in law revive the policy, or give a right of action upon it, unless in addition, the premium, or some other consideration, was actually paid and accepted.

Fourth. The jury are instructed, as matter of law, that a clerk or agent, authorized to collect premiums and remit the same to the company, and keep their books, would not, by that relation, be clothed with power to extend time for payment on the premium note, and revive a right of action upon the policy, after the same had become forfeited by non-payment of the premium note at maturity.

Fifth. The jury cannot give any effect to the act of the clerk in giving an extension, if they believe that he did, in fact, give such an extension, after the forfeiture of the policy, without some sufficient proof that he was authorized by the company to give the extension.

Sixth. A promise to extend the payment of the premium note, or statement that it would be extended after the policy had been forfeited for non-payment, would be inoperative in law, and could not bind the company unless made upon some good consideration paid, such as the actual acceptance of the premium, or some other valuable consideration from the policy holder and accepted by the company.

Each and every of said several instructions which the defendant's counsel requested the court to give to the jury, the court refused to give to the jury, and to each refusal of the court to give each several instruction so asked, the counsel for the defendant then and there separately and severally objected and excepted.

Counsel for the defendant thereupon again requested the

court to direct the jury to find a verdict for the defendant, which the court refused to do, to which refusal of the court the counsel for the defendant then and there duly excepted.

The jury found for the plaintiff, and a judgment was entered upon their verdict for $10,309.33. From which judgment, the case is brought, by writ of error, to this court.

ASSIGNMENT OF ERRORS.

The following are the errors assigned:

1st. The Court erred in refusing to instruct the jury, on each of the several points in regard to which instructions were asked by the defendant, and as asked by the defendant.

2d. The Court erred in his charge and instructions to the jury, in each of the particulars to which exceptions were taken.

3d. The Court erred in refusing to give each several instruction asked by defendant, and numbered respectively, one, two, three, four and five, and in refusing to give either of said instructions.

4th. The charge to the jury was erroneous in regard to the question of the extension of payment on the premium notes, and to the evidence necessary and proper to establish such extension.

5th. The Court erred in allowing the evidence of Randall, and the other evidence objected to by the defendant, to be admitted and considered by the jury.

6th. The Court erred in refusing to allow the motion to strike out the testimony of Randall as to the usage and practice of Randall, while acting as agent for the defendant, in retaining and collecting premium notes after due.

7th. The Court erred in allowing any evidence touching the usage and practice of the company, or its agents, upon the subject of retaining premium notes, and collecting them after they had matured.

8th. The Court erred in allowing any proof of extension under the declaration.

9th. The Court erred in refusing to direct the jury to find a verdict for the defendant.

ARGUMENT.

On the second of April, 1874, the plaintiff in error, The Knickerbocker Life Insurance Company, issued to the defendant in error, in the place of a policy issued on the 20th of April, 1867, but destroyed by fire in 1871, a policy of insurance upon the life of her husband, Jesse O. Norton, whereby, in consideration of a premium of $385, and of a like premium to be paid on or before the 21st of April, in every year during the continuance of the policy, the company insured the life of said Norton in the sum of $10,000 for the term of his natural life. The policy contained a provision that if any note, or other obligation, given for the premium on said policy, should not be paid at the time the same should become due and payable, then the company should not be liable to pay the sum assured, or any part thereof, and the policy should thenceforth be null and void, without notice to any party interested therein.

On the 20th of April, 1875, the company issued a renewal certificate, whereby it continued the policy in force for twelve months from the 20th of April, subject to and upon the express condition, that if any note given for any portion of the premium due that day upon the policy should not be paid on the day it should become due, then, and thenceforth, said policy, and the continuation thereof, should cease and become void, without notice to the insured or insurer, or any party interested therein. At the time of obtaining this renewal, Norton paid to the company $50 cash (see page 25 of printed record), and for the balance of the premium of $385, gave his two promissory notes for $167.50 each, payable, one in 60 and the other in 90 days, and it was stated in each note that it was given for the premium on this policy, and that if not paid at maturity the policy would be void, according to the contract in the policy.

These notes were not paid at maturity, nor was any offer to pay them made until the 15th of July, during the last illness of Judge Norton, and after his agent had been informed that the company had declined his application to have the notes extended to the 10th of August, and that the agent of the company in Chicago had, under instructions from his principal, treated the policy as forfeited, by returning the papers, &c., to the home office in New York. Judge Norton died August 3, and the defense to the action is, that the premium notes due respectively June 20 and July 20, were not paid at maturity.

It is expressly provided in the policy, renewal certificate and the notes themselves, that if these notes are not paid at maturity then the company shall not be liable to pay the sum insured, and the policy shall cease and be of no further force and effect, without notice to any party interested therein.

The parties had a perfect right to make such a contract as this, and the Court must enforce it as made.

Precisely such a defense prevailed in the case of *Catherine Pitt, administratrix*, v. *Berkshire Life Insurance Company*, 100 Mass., 500.

Colt J., in giving the opinion of the Court, at page 503, says :

" The rights of the plaintiff must be determined by the " terms of the contract to which the assured assented, " when such terms do not contravene the principles of law " or public policy. Here they are perfectly plain and in- " telligible, and no resort is necessary to the known rules " of interpretation to ascertain their meaning. The stipu- " lations in regard to the payment of premium are of the " substance of the contract, and were made upon adequate " consideration."

In the case of *Rochner* v. *The Knickerbocker Life Ins. Co.*, 4 Daly, (N. Y.,) 412, plaintiff's husband assigned to

her, with the consent of the defendants, a policy of insurance on his life, issued by them. A clause in the policy provided that failure to pay any note given for the premium should cause the policy to be void, without notice to any parties interested therein. At the time for payment of the annual premium (after the assignment had been made) defendants took in part payment thereof a note made by plaintiff's husband dated December 11th, 1869, payable four months after date, without grace, and having a clause providing that the policy was to be void in case the note was not paid at maturity, according to the contract in said policy. No demand of payment of the note was made, and on April 12th, 1870, the amount of the note was tendered to the defendants, who refused to receive it. The Court held,

1st. That no demand of payment of the note was necessary.

2d. That the note fell due on April 11th, 1870.

3d. That the note not having been paid at maturity, all the rights of the plaintiff under the policy were forfeited, and the policy was void by its own conditions.

Citing :

Robert v. *N. E. Life Ins. Co.*, 1 Disney, 355.
Fifty Associates v. *Howland*, 5 Cush., 214.

The Court say : "The parties having expressly "agreed that the failure to pay the note on the day it was "due should make the policy void without notice, the "Court cannot by construction make a different contract "from what the parties themselves have made. By the "terms of their agreement the policy had become void on "the 12th, the day when the plaintiff went to the defend-"ant and tendered the amount of the note."

Citing :

Baker v. *Union Mutual Life Ins. Co.*, 43 N. Y., 283.

Pitt v. *Berkshire Life Ins. Co.*, 100 Mass., 500.

Hozvell v. *Knickerbocker Life Ins. Co.*, 3 Robt., 232.

In the case of *Cutoir* v. *Am. Life Ins. & Trust Co.*, 33 N. J., 487, it was held, that where it is stipulated in a policy of insurance upon life that a certain sum shall be paid at the time of the delivery of the policy, and a like sum paid quarterly thereafter, in each and every year, always in advance, and in case the party procuring the policy shall not pay the quarterly premiums on or before the several days specified for payment of the same, the policy to be void, and all payments and profits which may have accrued shall be forfeited to the company; the party is bound to a strict performance of the conditions of the policy, unless such performance is legally modified by the company.

That the delay of payment for twenty-three days beyond the time when a premium became due, works a forfeiture of the policy, unless the party claiming the benefit of it shows that the company had legally waived or dispensed with the payment as it became due.

That when the policy itself contains an express limitation upon the power of agents, an agent has no legal right to contract as against the company with the party to whom the policy has been issued, so as to change the terms of the policy, or to dispense with the performance of any part of the consideration, either by parol or in writing, and such party is estopped by accepting the policy from setting up powers in the agent at the time in opposition to limitations and conditions in the policy. These limitations are presumed to continue. In the face of a distinct written expression in the policy of a want of power in the agent, the party seeking to recover upon such a policy has no right to infer the subsequent existence

of such power by any uncertain signs. There must be evidence to justify the belief that the company by direct authority enlarged the powers of the agent beyond what they were as restricted in the policy, or that they knowingly permitted him to act for them beyond the scope of said powers.

In the case of *Howell* v. *Knickerbocker Life Ins. Co.*, 3 Robertson (N. Y.), 232, it was held that when a policy of life insurance, for a year, which contains a clause continuing it until the decease of the insured, *provided* he should pay to the insurers, annually, on a day named, a specified sum; and a condition that no insurance (whether original or by renewal), should be considered as binding until the actual payment of such sum, ceases to be binding upon the insurers in case of a failure to pay the premium, so fixed for renewal, on or before the day on which it is made payable by such policy.

That parol evidence of a practice, or agreement, on the part of the insurers to receive payment of premiums after the day on which they became due (even if admissible), will not suffice to vary the written contract.

In the case of *Robert* v. *N. E. Mu. L. Ins. Co.*, 1 Disney (Su. Ct. of Cin.), 355, it was held that if there is a failure to pay at the time when by the terms of the policy it is to be paid, the risk is at an end.

That when by the terms of the policy a portion of the annual premium is to be paid in advance, and the residue in six months, and a note is taken for the deferred payment, a failure to pay the note at maturity defeats the policy, so that if within the year, but after the note became due, it was unpaid, the life should terminate, no claim can be set up against the insurer; his liability no longer exists.

In the case of *Baker* v. *The Union Mutual Life Ins. Co.*, 43 N. Y., 283, it was held that where notes were given by

the insured as a substitute for a cash payment on a policy of insurance, which notes contain a provision that if not paid at maturity the policy shall become void, they must be paid when due, or the policy will be forfeited.

And in delivering the opinion of the court, ALLEN, J., on page 288, uses the following language, viz:

"The policy accepted and held by the insured and the "notes taken and held by the insurers express the con- "dition in the same terms and the language is explicit and in- "capable of an interpretation which shall vary the literal "reading of the clause. In so many words, the parties "have agreed that upon failure to pay the notes at matur- "ity, the policy shall become immediately void, and the "insurers shall be released from all obligations under it.

"The contingency has happened, and the result dictated "by the contract necessarily follows; and the courts can- "not release parties from their own contracts fairly made, "or make new contracts for them. *Pitt* v. *Berkshire Life* "*Insurance Co.* (100 Mass., 500), is in all its essentials "the same as the case at bar, and the court there held, "and for reasons entirely conclusive, that the policy was "forfeited by the non-payment of the note, and that no re- "covery could be had upon it."

In the case of *Wall* v. *The Home Insurance Co.*, 36 N.Y., 157, where a marine policy of insurance contained the clause:

"In case the note or obligation given for the premium "herefor be not paid at maturity the full amount of pre- "mium shall be considered as earned, and this policy be- "comes void while said note or obligation remains over- "due or unpaid," it was held that an agreement by the company that the *note* might lie over a few days, did not waive the forfeiture or restore the right of action upon the policy.

This question was very fully considered in the case of

N. Y. Life Ins. Co. v. *Statham et al.*, 3 Otto, 24, where it is held that the non-payment of the premium on the day appointed, upon a policy of this character, involves an absolute forfeiture of the policy, which cannot be relieved against in equity, and if this non-payment is caused by the intervention of war between the territories in which the insurance companies and the assured respectively reside, which makes it unlawful for them to hold intercourse, the policy is nevertheless forfeited.

We cite, also, upon this point, the following authorities:

Beadle v. *Chenango Co. Mut. Ins. Co.* 3 Hill, 161.

Shaw v. *Berkshire Life Ins. Co.*, 103 Mass., 254.

Bradley v. *Potomac Fire Ins. Co.*, 32 Md., 108.

Union Mutual Life Ins. Co. v. *McMillen*, 24 O. St., 67.

Mutual Benefit Ins. Co. v. *Reese*, 8 Ga., 534.

Sullivan v. *Cotton States Life Ins. Co.* 43 Ga., 423.

Since the premium is the sole inducement to the risk, it is certainly not unreasonable to make its continuance depend upon the payment of the premium, and where the parties to the contract of insurance have, by their contract, thus conditioned the duration of the risk, effect must be given to their agreement. The parties so stipulated in this contract. The insurance company made this condition conspicuous in every obligation it gave or received, namely: in the original policy, in the certificate of renewal, and in the premium notes.

In answer to this objection, the plaintiff attempted to show that the company's collecting agent in Chicago, Mr. Frary, extended the payment of the premium note. To this it was necessary to show:

First. That the agent had authority from the company to make this extension, and.

Secondly. That he did actually make it.

The first note matured on the 20th of June, and no application was made to have it extended, until after the 22d of June, when the son of Judge Norton applied to the agent and requested that payment of the note be postponed until the 20th of July. (See page 20 of printed abstract.)

On page 27, witness says: "I first called upon this "agent the beginning of the next week after I came home, "in June, last part of the month." On page 26, he says: "Father telegraphed me to come to Chicago. I came "here on the 22d of June," and on page 28, he says, if the note was due on the 20th of June, it was past due when he called. "It was three or four days after the 20th of "June." It will be borne in mind that the note was payable without grace.

So the policy was already forfeited when this application for what is erroneously called an extension of the note was made. The following statement is expressly made a part of the contract of insurance: "Agents of the company are not "authorized to make, alter or abrogate contracts, or waive "forfeitures." To show that the agent, Frary, had authority to waive this forfeiture, and revive and continue the liability of the company, not by accepting payment of the premium note, but by saying that he would accept it at a future day, the plaintiff has attempted to prove that Randall, who was general manager of the company's business in Chicago from 1868 to 1874, and while it was issuing policies, was in the habit of retaining premium notes, at first for ninety days after they were due, then sixty days, and then for thirty days, and the judge in his charge directed the attention of the jury to this evidence, and directed them to determine its bearing upon the question of Frary's author-

ity to extend the payment of premium notes. Frary was in no sense the successor of Randall. He was acting at a different time, and not in the same capacity for the company. When he was acting for the company, in Chicago, it was winding up its business in Chicago, and he was simply its book-keeper and collecting agent, and there was no evidence showing or tending to show that he succeeded to the authority or discretion given to Randall.

The evidence, therefore, was utterly irrelevant, and should not have been put into the case. Not only was there the absence of any proof justifying the use of this testimony, but Frary himself was sworn as a witness for the plaintiff, and it appears from his direct examination, that he was acting under limited instructions, and was clothed with the narrowest discretion. He says (see page 25 of printed record):

"I, as a general thing, waited for instructions to return, "but I always returned on or before the 15th of the month "after they were due; that is, if they were due in Novem- "ber, I returned them on or before the 15th of Decem- "ber, all of them; and any time before that time, I "accepted the payment of the notes, even after they were "due, upon a medical examination and satisfactory proof "of the party's good health:" and upon the subject of "granting an extension, he says in his direct examination, which is therefore the plaintiff's testimony in the case: "I do not remember of the son of Judge Norton coming "to my office in June, and offering to pay one of these "notes or both of them. I remember he did in July; I "told him that I had no receipt; that the receipt had gone "to the company" (meaning here no notes). "I refused to "accept payment of the note, of course;" and in his cross-examination, this witness says distinctly that he had no authority to extend the time of paying the premium notes.

It will be borne in mind that the first application to ex-

tend the payment of the notes, was after the first note matured, and during Judge Norton's last illness, and there was no proposition from any one, for him to submit to a medical examination, in order to justify the agent in exercising the discretion he here speaks of. As we have already said, by the terms of the contract, the policy had, at the time Norton's son first called upon this agent, ceased to exist, and all obligation of the company had ceased with it. Any act or declaration of the company, or its agent, done or made at that time, cannot be regarded in the same light as if done or made before the note matured, and while the policy was in force.

The phrase, "extension of the payment of the note, and "thus continuing the life of the policy," cannot properly be predicated of any declaration of the agent made after the note matured, and after the life of the policy had ceased. In the case of the *Security Ins. Co.* v. *Fay*, 22 Mich., 472, the Court say:

"It is not to be taken for granted that an expired policy "would be revived in all cases where an existing one "might be modified or allowed to be affected by new "insurances elsewhere." Although the circumstances of that case, in respect to which these words were spoken, are not the same as the circumstances of the case now before the court, yet there is here clearly expressed the distinction we are seeking to make. The fact, then, should be observed that, at the time when this interview took place between Norton's son and the clerk of the Insurance Company, to wit, on or about the 27th of June, the date fixed by Norton's son, in his testimony on the 29th page of printed abstract, this policy was a dead instrument, and there was only one of two ways by which life could be restored to it — one was by accepting payment of the note which would estop the company from insisting upon the forfeiture, and thereby substantially waiving it, and the

other, by the parties making a new agreement, which, to be valid, must of course be founded upon a sufficient consideration. An agent of the company might very well have authority to accept, at his discretion, payment of the note after it should become due, and still not have authority to make a binding agreement in behalf of the company to accept payment of the note at a future day, and thereby revive and continue the risk, while the premium, which was the consideration for it, should remain unpaid.

It would be expected of an agent, having this discretionary power to receive payment of the note after it should become due, and thus bind the company by estoppel, that he would satisfy himself that the life insured was as sound, and had as good a prospect of indefinite continuance, when the money was paid, as when the forfeiture took place, and upon the supposition that he was faithful to the interest of the company, the company could very well allow to him this freedom of action, for such definite period as it should choose to fix. But it would be quite another thing to give to the agent an authority to extend the payment of the note to a future day after the forfeiture had taken place, and thus obligate the company to receive the payment of it on that day, notwithstanding the fact that the life had in the mean time become enfeebled or had disappeared altogether. It is clear, then, that an authority to make such an agreement cannot be inferred from an authority to receive payment of the premium notes after they had matured; and yet the testimony of the witness, Frary, was given to the jury notwithstanding the defendant's objections, precisely for this purpose, and they were substantially told in the charge of the Court [redacted] that they were at liberty to infer from this testimony an authority in the agent to waive this forfeiture.

And again this agent, Frary, was the plaintiff's witness, and he states distinctly in his testimony that he had no

authority whatever from the company to waive the forfeiture, or in any manner extend the payment of the note. It is expressly stated in the policy that no agent of the company has such authority. In view of these facts it was manifest error for the court to submit this question to the jury for them to find whether he had or had not this authority. It is not claimed that any act was done by the company or its agent which could operate as an estoppel upon the company. To constitute an estoppel, "there "must be such conduct on the part of the insurer as "would otherwise operate as a fraud on the other party "who has taken some action to his own prejudice in reli- "ance upon it. Where no act has been done by the in- "sured in honest reliance on such waiver, there can be no "estoppel."

Insurance Company v. *Fay*, 22 Mich., 468.

There is no semblance of testimony anywhere that Judge Norton's conduct was at all influenced by what the agent said to his son on the 27th of June, or that he ever did anything in reliance upon what this agent then said.

II.

The plaintiff was equally unfortunate in her attempt to prove the agreement. In the first place there was clearly no consideration to support the agreement, if any had been made. This witness Frary says distinctly that no such agreement was made. The only other witness who swore upon the subject was her son Martin Norton. The following is his testimony on this point.

"I think it was the next day, it was either Friday or "Saturday, that he (Judge Norton) showed me a notifica- "tion from the Knickerbocker Life Insurance Company, "saying something about it was coming due June the 20th,

"and he told me to go over there, told me where it was, "where to find the agent, to go over there and tell him "that he would pay that note on the 20th of the next "month (July) and I went over there, but the first time "that I went there there was no one there, the door was "locked. The second time I went there I found the agent, "the first of the next week. He was a little distance off, "and I told him I wanted to get this extended until the "20th, and he said he could not. Something about he "could not do it, and I told him: 'Why,' says I, 'Judge "Norton told me to come over here and tell you that he "would pay this note on the 20th and it would be all right,' "—something to that effect, and he says, 'oh! Judge "Norton,' and then he told me to tell the judge it was "all right."

This is all there is of this agreement to extend the payment of this note. It does not appear that Judge Norton sent his son to the agent to see whether he could not get an extension of the payment of this note, but simply to say to the person who held it for collection that he would pay it on the 20th of July.

The agent at first said that he had no power to wait so long, and upon being told that it was Judge Norton's note, he simply said "all right."

What do the words "all right" in that connection mean? It will be observed that Judge Norton's son said to the agent in this interview, and before the agent had used this phrase, that his father had sent him there to say to him that he would pay this note on the 20th of July, and "it would be all right," and the agent simply repeated the language or the phrase which the son had put into his mouth, and when told that he was a messenger from Judge Norton. Upon being thus assured from Judge Norton, who was so directly interested in the matter, that it was all right, he inferred that there was some relation between

Judge Norton and the company that would make it right, and by simply repeating what Judge Norton had said by the mouth of his messenger, he manifestly intended to have it understood that it would be all right so far as he, the agent of the company, was concerned, without intending by this language to make any agreement that should bind the company.

This is the plain and obvious meaning and effect of what the agent said, and we think it was error in the court to submit to the jury as a question of fact based solely upon this narration of the interview by this witness, whether or not the agent made such an agreement binding upon the company as is claimed by the plaintiff in this case.

It is unnecessary to pay any regard to the subsequent interview of the 8th of July, for young Norton himself says that at that interview he requested a postponement of payment of both notes until the 20th of August, that the agent declined to grant this request, and simply agreed to lay it before the compay. He did so, and the company declined to grant it.

We submit, if the Court please, that there was nothing whatever in this case to go to the jury; that the verdict has not a scintilla of evidence for its support; and that judgment has been entered upon it in utter disregard of well settled rules of law in cases of this character, and that the judgment entered upon it should be reversed.

H. S. MILLER & FROST,

Attorneys for the Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1877.

No. 745.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

—VS.—

PHŒBE A. NORTON, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argument in Reply in Behalf of the Plaintiff in Error.

MILLER & FROST,
ATTORNEYS FOR THE PLAINTIFF IN ERROR.

CHICAGO:
JEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1877.

mium note, was changed by the parties, and the forfeiture, occasioned by the default in non-payment of the premium note, was waived.

In fact, this proposition seems not to be seriously controverted by the counsel for the defendant in error, but he bases his right of recovery under the policy exclusively upon the ground that this forfeiture, caused by the non-payment of the premium note, was waived by the Company, and its liability thereby revived. There is no pretense that this change was made, or this forfeiture waived, by any corporate act or resolution of the Company, or in any way whatever, *except by what was done by Frary, the agent* of the Company, employed to keep the books and to collect premiums. The entire controversy in this case, therefore, rests for determination upon two questions.

One is, whether Frary, in point of fact, ever did waive this forfeiture, or extend the time of payment; and the other is, in case what Frary did amounted to a waiver—whether he had *authority* to alter the contract, or to waive the forfeiture.

In discussing these questions, the counsel for the defendant in error insists, at the outset, in answer to the positions taken on behalf of the plaintiff in error, that "though a "policy of insurance may provide that an agent shall have "no power to waive forfeitures, or modify the contract, in "any way, the Company may, nevertheless, so authorize "its agents, or estop itself, by its conduct, from denying "the grant of such powers to them."

This proposition is doubtless correct. The Company may confer, after the execution of a policy containing these restrictions, express and additional power upon its agents, and may, by an affirmation of even the unauthorized act of its agent, estop itself from questioning the validity of the act, or denying the power of the agent.

But the fact that this new power has been conferred, or of the ratification of the unauthorized act of the agent, must be made to appear by evidence, and until this does so affirmatively appear, the original contract must stand, and the absence of power in the agent expressly stated and stipulated in the policy, must be presumed to continue, and the distinct and unequivocal notice thus given to the policy holder places him in a position in which he cannot legally set up, by way of estoppel, that he was misled by the acts or declarations of the Company into the belief that the agent had the power to waive a forfeiture, when, in point of fact, and by the express terms of the policy, he had no such power.

If there was any possibility of mistake in the matter as to what power the agent possessed, it was effectually prevented by this unequivocal notice and stipulation in the policy.

If, after such a notice, the policy holder is misled as to the power of the agent, it is his own fault, and he can acquire no rights in consequence of such mistake. If all this, however, was changed by some subsequent act or declaration of the Company, that act or declaration must be shown otherwise, the agent must be held to have no such power as to waive a forfeiture, and the insured must also be held to know this fact, as he is distinctly apprised of it by the very terms of the policy upon which his rights depend.

The counsel cite the case of the *Ætna Ins. Co.* v. *McGuire*, 51 Ill., 350, as "one very much like the one now before "the Court."

We entirely fail to discover the similarity between the two cases, so far as the facts are concerned, or to discover any principle of law asserted in the citation from the opinion of the Court, which sustains the position taken by the counsel for the defendant in error in this case. In that

case the local agent of an insurance company issued a policy, which, by its terms, was subject to the approval or disapproval of the general agent. The premium was paid to the local agent, who, in making his monthly returns to the general office, included it in his returns, and it was paid over to that office, and a credit was given to the local agent therefor on the books, and it was held that the policy thus issued by the local agent was not only not repudiated by the general agent, or by the company, but on the contrary was recognized and ratified by them. They had received the money without objection, and whatever power the local agent originally had, as the company accepted the premium with knowledge of the facts, they must necessarily be liable upon the policy, and the court held that the subsequent cancellation of the policy by the general agent was not only no evidence of a repudiation of the contract by the company, but was, on the contrary, "an emphatic recognition of the existence of the policy."

Now, if in the case at bar the company, after the maturity of the premium note, had accepted payment of the note, or it had been paid to the agent, and by him returned to and received by the company, it might then be argued that there was some similarity between the cases. But in *this essential fact* the similarity altogether fails. In that case the company accepted the money or premium paid to the agent, and by the agent returned to the company. Here, nothing was paid to the agent, and nothing was received by the company; and hence there was no revival of the policy, or validity given to it; whereas, in the case cited, the payment of the money to the company, and acceptance by the company, constituted the very acts which gave vitality and validity to the policy.

Nor is there anything in the citation given from the opinion of the court in that case containing any principle of law in support of the position taken on the other side.

or in conflict with that taken on behalf of the plaintiff in error. The language found in this citation declares that, "when a loss happens," the insurance companies "should not "be permitted to say in any case their agent acted beyond "the scope of his authority, unless it shall be made to "appear the assured was informed of and knew the pre- "cise extent of the authority conferred." This proposition, however, must be understood with the condition and qualification before stated by the court, namely, that, "when "an insurance company has appointed an agent, known "and recognized as such, and he, by his acts known and "*acquiesced in by them*, induces the public to believe he is "vested with all the power and authority necessary for "him to do the act, and nothing to the contrary is shown "or pretended at the time of doing the act, public policy, "the safety of the people demand the company should be "liable for such of his acts as appear on their face to be "usual and proper in and about the business in which the "agent is engaged."

But take it with or without this qualification, it is certainly true in the case at bar that "the assured *was in-* "*formed* of and knew the precise extent of the authority conferred." For it was distinctly stated in the policy itself that "agents of the company were not authorized to "make, alter or abrogate contracts or waive forfeitures;" and in the very note given upon the renewal of the policy, and but a few months prior to the death of the party whose life was insured, and for the non-payment of which the for- "feiture accrued, it was stated that the "policy was to be "void in case the note was not paid at maturity, according "to contract in said policy."

And the same thing, in substance, is stated in the last renewal. After such explicit notice and distinct stipulation in the policy, there was no chance for mistake. The party must be held to have known at the time the premium note

matured that the non-payment of the same at maturity would forfeit the policy, without the possibility of relief from any action or assumed waiver on the part of the agent. The doctrine of estoppel has no application whatever to such a case. Nor does the proposition that "private in- "structions not communicated to the insured will not "avail the company as a defense," have any application whatever to the case at bar. Nor is the principle cited from the opinion of the Court in the case of *The Eclectic Life Ins. Co.* v. *Fahrenborg*, 68 Ills., at all pertinent to this case, where it is said that "the question is not what power "did the agent in fact possess, but what power did the "company hold him out to the public as possessing." The agent was here not held out as possessing power to waive a forfeiture; but the party was distinctly advised to the contrary in the policy itself. It was, doubtless, competent for the company to waive the forfeiture, either by its own corporate act or through an agent expressly clothed with power for this purpose. But, in the absence of any such act, or of any such power expressly given, and any modification of the contract under such power, or by its corporate act, the provisions of the policy and of the renewal, and of the premium note, must control. In the absence of any such affirmative proof on the other side, the presumption of law is against and not in favor of the position taken by the counsel for the defendant in error.

It is insisted that, whether the company held their agent out as possessing power to waive their forfeiture, and what was the extent of his authority, are questions for the jury. These, as well as all other matters of fact, are, of course, questions for the jury.

But there must be *evidence* upon which the jury are authorized to act, and the Court has no right to submit questions of fact to a jury when there is no legitimate evidence on the subject proper for their consideration, and when the

entire evidence offered and given upon the question of fact has no legal tendency to establish the proposition of fact contended for.

And, so far as this question of authority is concerned, there was, as matter of law, nothing to submit to the jury. There was no legal proof that Frary was ever authorized to extend the time of payment after the day of payment had already passed, and the forfeiture named in the policy had already accrued. There was no question of conflicting evidence on the point of authority for the jury to settle. It was simply a question of law upon conceded facts, whether any such power existed, or which could rightfully be exercised under the terms of the policy. Frary, the clerk, swore that he had no such authority, and no witness contradicted him or proved that he had such authority. There was nothing left, so far as this question of authority was concerned, but a question of law to be decided by the Court.

It is insisted that the power and authority that was given to George C. Randall, who had, according to his testimony, occupied the various positions of cashier, bookkeeper, and afterwards manager for said Insurance Company, in the city of Chicago, was competent evidence by which to establish the degree of authority possessed by Frary, the clerk, with whom it is claimed the agreement for an extension was made. This evidence was objected to at the time it was offered, as incompetent, and the motion was subsequently made to strike it out. Both motions were refused by the court, and the evidence was received, and was submitted by the court to the jury as competent proof, and pertinent and material to be considered by the jury upon the question of the extent of the power actually vested in the clerk Frary, and the judge in his charge to the jury, styles Frary the "successor of Randall," although there is no evidence in the case that he was his

successor, or that he ever at any time occupied the position of manager, which Randall swears he formerly held.

Insurance Companies have various agents vested with diverse and varying powers, more or less limited, and some with greater power than others. There is no presumption of law that one agent of an Insurance Company or of any other company possesses the same power as another agent. There is no presumption on the subject one way or the other. The material inquiry was, what was the actual power and authority conferred upon Frary, or what power did the company hold out to the world and those dealing with it, that Frary possessed? It was a totally immaterial inquiry what power Randall had, nor could his power constitute in law the measure of the power and authority of Frary. The only way such evidence could possibly be material would be by affirmative proof that Frary's powers were the same as those of Randall. This evidence, though a roundabout mode of reaching the material fact of the extent of Frary's authority, might possibly be competent, provided the evidence was supplemented by proof that the powers of the two agents were the same. But no such proof was offered, no witness testified to it. Frary testified that he had no such power, and the evidence upon the subject of Randall's authority should upon the motion of the defendant below, have been stricken out. If this evidence as to Randall's authority and practice was admissible at all, it was clearly inadmissible for the purpose for which the judge in his charge directed the jury to consider it, namely for the purpose of determining the extent of the power vested in Frary. The fact of Frary's authority was a fact to be ascertained and determined like any other fact, namely, by distinct and direct evidence of the fact itself, or indirectly by proof of the power actually exercised by Frary, and by proof of the acquiesence in his acts on the part of the company. The inquiry as to what Randall could do, or what he did do,

under the authority of the company, was wholly superfluous and immaterial. It is suggested by the counsel for the defendant, that no new consideration is "necessary to "sustain a waiver of forfeiture and extension of time to "pay premium or premium notes," and two cases are referred to as authority for this position.

The first is that of *Lester* v. *Knickerbocker Life Insurance Co.*, 5 N. Y. S. C. R., 497, and the other is the case of *Viele* v. *Germania Ins. Co.*, 26 Iowa, 9. In the first case the policy was in the possession of the Insurance Company before and at the time the premium fell due, being pledged for a loan made upon the policy. The party to whom the policy was payable for the purpose of keeping it alive and beforethe premium was due, applied to the company for information as to the date at which the same was payable. The company, upon the application being made, did not give the date, but promised to send it to the party making the application. They however failed to do it. Subsequently the party to whom it was payable called at the Company's office and offered to pay the premium, but it was refused upon the ground that it was too late, that the time of payment had passed. Upon this state of facts it was held that the company was estopped from claiming that the policy had lapsed or that a forfeiture had acrued by reason of the non-payment of the premium at maturity. Here was a clear and unequivocal case of estoppel *in pais*. The company had misled the party to his injury, and had induced him to take a step resulting, if the company were allowed to avail themselves of it, in a forfeiture of the policy. The company were in fact the authors of the default of the party to whom the policy was payable, and they were not permitted thus to take advantage of their own wrong. When a fair case of estoppel *in pais* is presented like this, an independent ground of relief is afforded, not resting upon contract, or requiring a consideration.

The other case cited, that of *Viele* v. *Germania Ins. Co.*, seems to have been decided upon similar grounds, as the following language of the court fairly implies, viz., pages 55 and 56:

"It seems reasonable that the same character of evi-
"dence will establish a waiver or dispensation of condi-
"tions that is sufficient to prove the existence of a con-
"tract; an express agreement to that effect will of course
"be sufficient. Circumstances proving that the party
"treated the contract as subsisting and not forfeited, a
"course of dealing consistent only with that hypothesis, and
"acts and declarations whereby the other party was in-
"duced to believe that the condition was dispensed with or
"forfeiture waived, will be sufficient to preclude the setting
"up of the breaches of the condition as a defense to the
"contract of the party bound thereby. Thus the receipt
"of premiums upon a policy after forfeiture, is a waiver
"thereof.

"So the taking of an additional risk on the same policy
"will waive a forfeiture existing at the time for breach of
"condition.

"The renewal of a life policy which had expired by
"non-payment of premium, in favor of one who at the
"time was sick, and so known to the officer renewing the
"policy, is a waiver of conditions against ill health of the as-
"sured, which otherwise would have avoided the policy.

"The waiver, or dispensation, is not in the nature of a
"contract which requires the support of a consideration,
"but rather of an estoppel, whereby the underwriter is
"precluded from denying the validity of the contract, on
"account of acts or admissions, in the recognizing it as of
"force after the forfeiture, or holding out to the assured
"that the performance of the condition is dispensed with."

According to this authority, the waiver of the forfeiture may rest either upon contract or upon estoppel. If a good

case is made out under either head, the forfeiture is waived, and the contract revived. The waiver must rest upon one ground or the other. If a case of estoppel is fairly made out, no new consideration is required. Estoppel *in pais* rests upon the ground of actual or constructive fraud, an inducement held *out by the one party and acted upon by the other*, makes an estoppel. If a party is induced to postpone payment by the act of the insurance company, done prior to the maturity of the demand, and thereby loses his right and subjects himself to a forfeiture, unless the other party is held estopped, then an estoppel arises. An acceptance of the premium is an estoppel, because it is an unequivocal act on the part of the company, indicating their intent to receive and continue the policy. Both parties act upon the hypothesis of its continuance. The one by payment of the premium, and the other by its acceptance. It would operate as a gross fraud upon the party assured were it held otherwise.

There was no payment or acceptance of the premium in this case. At the best, there was nothing more (even if there was that) than an implied promise to accept the money and waive the forfeiture at a future day. Where there is no case of actual estoppel established by the facts, and it is sought to waive the forfeiture, and revive the policy simply by force of an executory agreement, made after the forfeiture has accrued, and the company has been released from its obligation without fault on their part, or action on their part to induce the forfeiture, then such agreement, like any other agreement, to possess validity or to have any legal operation and effect, must rest upon a good or valuable consideration, otherwise it is a mere *nudum pactum*. There is no reason why the same rule which applies to other executory agreements should not apply here. No estoppel can exist where the party relying upon the estoppel has been induced to take no step by the action of the other party, and has lost no rights thereby. Where a for-

feiture has fairly accrued, and nothing has been done by either party to change their relations to each other, and nothing has transpired except a verbal promise to accept a future payment of a premium, the parties are substantially *in statu quo*, in precisely the same condition they were in when the forfeiture occurred. The company is released from its obligation, and remains discharged, until by *actual acceptance* of the premium at a subsequent date, or otherwise, it estops itself from questioning the validity of the policy, or until by a valid agreement for a good consideration, it waives the forfeiture and revives the policy. There could be no waiver in this case because the premium never having been paid or accepted, no estoppel could arise to prevent the company from insisting upon the forfeiture, and no valid contract was ever made by way of executory agreement, because there was no consideration to support the verbal implied promise upon which reliance is [redacted] placed.

We insist, therefore, that the position taken by the counsel for the defendant in error, that there was a valid legal waiver of the forfeiture is supported neither by sound principle, nor by approved and well considered authority. He has made no case, either by *estoppel* or by *contract*, and the company, therefore, in this case had a perfect right to rely upon the express terms of the policy, and the explicit stipulations upon the subject between the parties contained in their written contract, and there was not only no valid agreement to release upon which the assured could rely, but there was in addition distinct and unequivocal notice contained in the contract itself that the party upon whose promise reliance was placed had no authority whatever to make any such promise, even had there been ample consideration for the same.

It is, however, claimed that the verdict of the jury is final and conclusive upon these questions of fact, and that

there is no legal mode of correcting the mistake, however erroneous their conclusion may have been. The questions of law, however, upon the admissibility and effect of the testimony, and the charge of the judge in reference thereto, and the exceptions taken to the charge, and to the refusal of the court to direct the jury to find a verdict for the defendant below, are subjects proper for *review by the appellate tribunal*, and legitimately call for the determination by this court of the matters involved.

Two questions of fact were, by the direction of the court, submitted to the jury. The first question was, whether Frary, the clerk who had charge of the books had authority to extend the time of payment of the premium note maturing June 20th, 1875.

The second question was, whether Frary, the clerk, did, in fact, give the thirty days extension which the plaintiff claims that he gave.

Upon the latter question there was doubtless conflict of testimony between the statements of the clerk and those of Judge Norton's son. It was the province of the jury to determine this conflict of testimony, and their decision thereupon is, of course, final. It still, however, remains to be determined, even in respect to this question of fact as to whether there was an agreement for an extension, what the effect of the statement which the clerk made, if he did make the statement attributed to him by Judge Norton's son, actually was in law, and whether this statement, if made, will operate to revive a liability once gone.

Upon the question of the authority of the clerk to grant an extension, the evidence, we submit, fell altogether short of establishing such authority, and was, in fact, incompetent for any such purpose, and should have been excluded by the court from the consideration of the jury upon the following grounds :

First. Proof of authority in Randall, the agent and manager of the insurance company, to grant extensions or collect premium notes long after they were due, could not prove, or have any legal tendency to prove, an authority in Frary to grant extensions, although neither Randall nor Frary ever had authority to do this, unless it was implied from allowing the premium notes to remain in their hands for collection. (Pages 23 and 24.) There was not, and could not, be any legal presumption that the authority which one of these parties possessed was the same as that which the other possessed. If the circumstances of the case would for a moment warrant any such presumption, it was effectually dissipated by the express testimony of Frary, the clerk, that he had no such authority. His business, moreover, was proved to be that of a bookkeeper for the defendants, with authority to collect premium notes which were forwarded to him for this purpose. He had no power to issue policies or make contracts concerning them. The company seems to have been winding up its business in this locality, and he remained in the office for this purpose. No usage or custom of the company, in regard to one agent or manager, could, in the nature of the case, furnish any evidence as to the powers of another agent or clerk of the defendants.

Second. No special authority was ever given to Frary, the clerk, to extend the time for the payment of the premium notes that were sent to him for collection. The simple act of entrusting an agent with the collection of a note, does not carry with it, by operation of law, the power to make a valid and binding agreement for the postponement of the payment of the claim, and especially the power by such extension to create or revive a claim against the company of ten thousand dollars.

The agent, in such circumstances, has simply the power to collect the notes, and nothing more. To give to this

transaction any other effect, would be simply extraordinary and unreasonable.

It may be that where notes are sent for the purpose of collection to an agent, he might continue to collect until his power was revoked, even though some time after the notes became due. It may be also that while this simple and ordinary power remains unrevoked, and the clerk in the exercise of that power collects the money due upon the note, that it will result by implication of law from such a transaction, that the company would be barred, by *actual payment*, as it might be if the payment were received by the company at its principal office or by its treasurer, from insisting upon the forfeiture, and be regarded as waiving it for a valuable consideration, namely, the payment of the premium note.

This result, however, does not arise from any special power conferred upon the agent to grant an extension or to revive a forfeiture, or to entail upon the company a liability for ten thousand dollars. It arises from the *fact of actual payment of the premium, and from nothing else.*

The waiver of the forfeiture, or revival of the liability, simply results by operation of law in such case, from the fact of an authorized payment, and acceptance thereof, of the premium note. A power to make a valid and binding extension of payment is not and cannot be implied by law from a simple authority to an agent to collect the note. The two powers are entirely distinct from each other, and most especially is it true that such an agent could not take this power to grant a valid extension, by implication from a mere power to collect, if the effect of such an agreement to extend carries with it by legal necessity the creation against the company of a debt of ten thousand dollars. Such a power must be expressly given, or most clearly implied, from some general or extensive grant of power conferred upon an agent.

In the case of *Sarah Baxter* v. *Chelsea Mutual Fire Ins. Co.*, 1 Allen (Mass.,) Rep., 294, 295, it was held that the *president* of the company could not make a valid oral agreement for the renewal of a policy where the premium had not been paid, or note given therefor, and that the company was not bound by such agreement, nor even estopped by the express statement of the president to the assignee of the policy, "that such assignee need not give "herself any concern about it, that the policy was renewed "and she was insured."

CHAPMAN J., in delivering the opinion of the Court, says: "All but one of the questions raised here have "been decided in the recent case of Brewer *vs.* these de- "fendants, 14 Gray, 203. In that case it appeared that "Gerrish had taken the same steps towards obtaining in- "surance that he has done in this case, and they were held "to be insufficient. The plaintiff in that case was his "mortgagee, to whom the policy was to be made payable "in case of loss. It was there held that the president was "but a special agent of the company, and could not by "his agreements effect insurance on terms forbidden by "the by-laws. He had in that case made the same agree- "ment with Gerrish that he did in this case. But he "plaintiff proved in the present case that he sent a person "to the president to inquire about the matter, and the "president in reply to her agent represented that Gerrish "had obtained the insurance. It is contended that the de- "fendants are estopped to deny the truth of this represen- "tation; but the obvious answer to this is, the president "could no more bind the company by his representations "beyond the scope of his authority than by his agree- "ments."

If a president of an insurance company cannot, without express authority, renew or revive a policy contrary to the by-laws, how can a mere clerk or bookkeeper, clothed

with a simple authority to collect premium notes, have the power to revive or renew a policy once absolutely extinguished, and to entail upon the company a debt of $10,000? And this, too, when, upon the policy itself, distinct notice is given to the policy holder that no agent of the company has any power, under any circumstances, to waive a forfeiture after it has been incurred, and when, moreover, as in this case, it is stated in the policy, repeated in the premium note, and again reiterated in the renewal receipt, that non-payment of the principal or interest upon the premium note at maturity shall operate, without notice, as a forfeiture of the policy?

But what does the statement made by the clerk, according to the testimony of Judge Norton's son, amount to, if it was ever made, which the clerk unequivocally denies? Does it amount to an operative and binding contract, enforceable either in law or equity, for the postponement of the payment of the note? We submit that it can have no such operation or effect. And, upon this point, we refer to the case of *Wall* v. *The Homestead Ins. Co.*, 36 N. Y. Ct. of Appeals, 157. That was a case of a marine policy containing a provision that, "in case the note or obligation "given for the premium be not paid at maturity, the full "amount of premium shall be considered as earned, and "this policy becomes void while said note or obligation re-"mains overdue and unpaid." The note given for the premium was not paid at maturity, and the vessel insured was lost. It was held that there could be no recovery upon the policy of insurance, and that an agreement by the company's agent that the note might lie over for a few days, did not waive the forfeiture, or restore the right of action upon the policy.

It was claimed there, as here, that the condition of the policy had been waived by the company through the acts of their agent, and the plaintiff asked to be allowed to go

to the jury on this question. The testimony as to what the agent said, though given in various forms of expression, was to the effect that the note could lie over for a few days. It was held that this statement or agreement of the agent could not continue or revive the liability upon the policy, and that the judgment of the court below granting a nonsuit, and refusing to allow the plaintiff to go to the jury upon the question of fact, was correct, and should be affirmed.

There are only two ways in which the right of action upon the policy could be created or revived ; one is by estoppel, and the other by a valid contract upon a good consideration.

In order to operate by way of estoppel, it is necessary that the statement or conduct of the agent upon which the estoppel is predicated should have occurred prior to the maturity of the note, as otherwise there would be no change in the condition or conduct of the party misled by the matter creating the estoppel. He lost nothing by what occurred. If the note was past due and unpaid, his rights were gone. Nothing said or done after that could occasion him loss, or mislead him to his prejudice, for the forfeiture had already taken place. He was in no worse condition by reason of any representations or promises, or conduct on the part of the agent than before. The policy was forfeited at the time all this transpired, and so continued after it transpired. An estoppel could not arise in such a case. There being no estoppel therefore, and all liability on the part of the company having been extinguished, if a new liability is to be created, or which is equivalent to the same thing, an old liability wholly discharged is to be revived, it must be done by a *valid* contract upon a good *consideration*. A mere naked agreement to postpone payment of a note where nothing is paid, and no consideration passes, will not bar an action

upon the note, even for a single day. Such an agreement is a mere *nudum pactum*, having no legal efficacy whatever.

Miller v. *Holbrook*, 1 Wendell, 318.
Hunt v. *Bloom*, 5 Duer, 202.
Gibson v. *Renne*, 19 Wendell, 389.

If it cannot effect an actual postponement of the time for payment of the note so as to make it payable by force of the agreement at the expiration of the extended credit, and the note was suable immediately notwithstanding, then the note was still payable in legal effect at its maturity, and still remained overdue and unpaid, and the policy was forfeited, and so continued, notwithstanding the supposed agreement, which had no legal operation and effect, and in these circumstances, and by the express terms of the policy, all right of action thereupon was absolutely gone. In the eye of the law, every thing remained just as it stood at the time the note matured, and for six days thereafter, when the conversation was first had between the clerk and the son of Judge Norton.

In the case of *Wall* v. *The Home Ins. Co.*, 8 Bosworth, 597, which is the same case afterwards taken to the Court of Appeals, and reported in the 36th N. Y., above cited, White, Justice of the Superior Court, in delivering the opinion which was afterwards affirmed by the Court of Appeals, says:

"There is nothing in the plaintiff's testimony which "shows that Dobbins had any authority to vary contracts "made by the defendants, or to waive any condition in any "policy issued by them. Certainly he had no authority to "waive this important stipulation in the policy, forfeiting "it, or suspending its obligations while the assured were "in default on their part; and especially he had no such "authority after the forfeiture had attached, and the policy "had become, for the time being, an absolute nullity."

The case of *Daniel Caton* v. *The American Life Insurance and Trust Company*, in 33 N. J., 487, not only sustains to the letter these provisions of forfeiture and rigorous conditions in the policy as valid and effective, and as rendering the policy void, where these terms are not complied with, but is directly in point upon the question as *to the authority of the agent*, and to show that he has no power to change the terms of the policy, or to dispense with the performance of its conditions, especially in violation of the express provisions of the policy, to the effect that the agent has no legal right to waive a forfeiture.

The language of the Court upon this point, found upon page 492, is as follows: "In the face of a distinct written "expression of want of power in the policy, the plaintiff "has no right to infer a power to the contrary against the "company, by any uncertain signs. The limitations are "presumed to continue. The case is entirely destitute of "any evidence to justify the belief by the jury that the "company, by direct authority, enlarged the powers of "the agent beyond what they were, as restricted in the "policy, or that they in any way knowingly permitted "him to act for them beyond the scope of such powers. "This want of authority in the agent to relieve from the "payment of the premium when due, either by writing or "verbally, is a fatal defect in the plaintiff's claim, and it is "therefore deemed best to rest this decision upon that, "without any discussion or determination of other ques-"tions based upon a different state of facts. For this "reason the court was bound to non-suit the plaintiff." Again he says, on page 491: "It is clear that after the "policy was obtained by the plaintiff, the agent had then "no power to contract with him as against the defendants "to change the terms of the policy, or to dispense with "the performance of any part of the consideration, even "by writing, much less by word of mouth. * * * "He is estopped, by accepting the policy, from setting up

" in this case powers in the agent at that time in opposition " to the limitation of the conditions."

So, here, distinct written notice accompanied the policy, and was printed upon it, to the effect that no agent of the company had power to waive a forfeiture. This stipulation is treated by the plaintiff as a part of the contract, and is set forth and declared upon as such. The policy itself, moreover, contains an express provision to the effect that, extending indulgence as to one premium shall not be construed as an express or implied authority, or consent to indulgence for a future premium. To meet all this it must be proved that a change has been made, and an express authority given to the agent to waive prompt payment of the premium, or his act in so doing will be regarded as unauthorized and void, at least till affirmed by the company.

The same doctrine is held in the case of *Bouton* v. *The American Mutual Life Insurance Co.*, 25 Conn., 542–554.

The agent whose authority was questioned in that case seems to have been a general agent, and authorized to countersign and deliver policies and collect the premium. He seems to have been regarded, in fact, as having authority to make the contract; and yet, nevertheless, it was held that he had no right, under his power as agent, "to accept " the payment of a subsequent annual premium, after the " day when by the terms of the policy it was payable, and " where the policy, by reason of such non-payment had " ceased to be obligatory." The court say, on page 554, in discussing this question: " We think that he was not em- " powered to receive any premium which was not paid ac- " cording to the requirements of the policy, that is, in ad- " vance. That instrument was his sole guide in regard to " what he should do under it. The contract was to be " made by the defendants, and not by him, *excepting* in the " capacity of *their agent;* he was not authorized to alter " or vary it, or depart in any respect from it, or to dis-

"pense with the fulfillment of its conditions by the insured, "or discharge it, or revive it after it had by its terms "ceased to be obligatory on his principal, by a waiver "of compliance with its provisions, or otherwise." Again, on page 555, referring to the policy: "It expressly says "that the policy shall not be binding until the advance "premium is paid. The whole authority of the agent "being here expressed on the face of the instrument, there "is no place for the doctrine which is applicable to cases "where an agent with an ostensible general authority is "restricted, by particular and special private instructions "from his principal." The utmost the circumstances in this case tended to prove, even if they did this, was, that the agent had the power, while he held the notes for collection, to accept payment some days after maturity, and *thereby*, perhaps waive the forfeiture; not that he could waive the forfeiture *on that payment*, and by a mere executory agreement, without consideration. There is no evidence that Frary, the clerk or agent, *ever* did this in a single instance, with the knowledge or consent of the company, and before there was any tender or offer of payment, the company recalled the notes, and declined in express terms to give any extension.

Upon the trial the court was asked to instruct the jury in accordance with the foregoing views, but declined so to do. The court was also requested to instruct the jury: "as matter of law, that a clerk or agent, authorized to col- "lect premiums and remit the same to the company, and "keep their books, would not by that relation be clothed "with power to extend time for payment on the premium "note, and revive a right of action upon the policy after "the same had become forfeited by non-payment of the "premium note at maturity."

The question submitted to the jury as to the power of the agent, was a mixed question of law and fact. It was

the right of the defendant to have the law governing the relation of an agent, such as Frary held, clearly defined by the court, and to be informed whether *this relation itself* did or did not imply, in law, the power to give an extension, such as was claimed to have been given in this case.

If the law did not imply this power from the relation itself, and the jury were so told, before they could find upon the evidence, that the power existed, they must have been satisfied, *outside of the relation* of agent, such as Frary held, that the evidence satisfactorily established the fact that this power had been conferred upon him by the company, and that, too, in spite of his own direct testimony to the contrary.

It may be that this instruction would not have changed the verdict. It was one, however, which we were entitled to have given. It was based upon the facts, properly qualified, and naturally tended to enlighten the jury upon a material point in the case, and to guide them to a correct conclusion; and it was a point, moreover, with regard to which a jury might very readily fall into error.

The court declined to give the instruction, and the point raised by it was nowhere covered by the charge.

We think this was clearly error.

It is suggested by the counsel for the defendant in error, by the way of criticism upon the course adopted by the company in this case, that it is extremely inequitable to allow a recovery upon the policy to be defeated where some $3,000 has been actually received by the company by way of premiums during the life of the assured, and that this course of proceeding must enable the company to drive a very profitable business. The obvious answer, however, to all this is, that this is not an action to recover back the premiums paid, or to recover a just and reasonable sum by way of equitable adjustment, under the provisions of the

policy or otherwise. It is an action brought to recover upon the policy, according to its terms, the full amount of the insurance. This can only be done by showing full performance, on the part of the assured, of the terms of the policy. Strict payment at maturity of the premium note is compensated for, on the other hand, by the assumption of a heavy risk. Policies frequently lapse by non-payment of premium notes. This, of course, as everybody knows, is a considerable source of revenue to the companies. Hence, it is the right and privilege of the company, in consideration of the risk taken on their part, to exact strict performance by the other party, and, in case of non-performance, to take the benefit accruing therefrom. Whether this mode of doing business is, on the whole, for the interest of the public, and whether the contract made between the parties is or is not a severe one for the assured, are questions not involved in the decision of this case. The simple question is whether the party seeking to recover upon this policy the amount insured, has shown such a performance as entitles her to recover the $10,000 and interest secured by the terms of the policy on performance by the assured of its conditions. If, according to the terms and fair construction of the policy, its obligations have been fully discharged on the part of the assured, then the defendant in error is entitled to retain her verdict—otherwise not. Provision is made in the policy for the payment of an equitable amount where the policy has lapsed, "in consequence of non-"payment of the premium. Had any attempt been made on the part of the assured to take advantage of this provision, a different question might have arisen.

We submit, in conclusion, that the points of exception taken upon the trial, and here assigned for error, have not been met or disproved by the counsel for the defendant in error, and that, not only in the finding of the jury, but in the manner in which the case was placed before the jury,

by the charge and in the rulings of the court, as to the admissibility and effect of the testimony, both the law and the evidence have been disregarded, and errors of so grave and serious a character have intervened as to necessitate a reversal of the judgment.

MILLER & FROST,

Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D., 1877.

No. 745.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

—VS.—

PHŒBE A. NORTON, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT

In Behalf of Defendant in Error.

S. P. McCONNELL,

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An Insurance Company may waive any condition of a policy inserted therein for its benefit.

And though a policy of insurance may provide that an agent shall have no power to waive forfeitures, or modify the contract in any way, the company may nevertheless so authorize its agents, or estop itself by its conduct from denying the grant of such powers to them.

The opinion in the case of *Ætna Ins. Co.* v. *Maguire*, 51 Ills., 350 is an able and energetic application of this proposition. The case was one very much like the one now before the court. The Company had allowed its agent to exercise a large amount of discretion and power, but a loss occuring the Company attempted to protect itself by relying upon the limited powers given the agent in the policy.

The Court says:

"The general agent says, Sweet's jurisdiction was limited to Nebraska City, but he does not urge that as an objection to the policy in his letter requesting the agent to cancel it; nor can it be tolerated that these companies shall send agents on whom they have impressed their confidence by appointing them into States and countries remote from the place of their organization, and from their general office, seemingly clothed with all the powers necessary to enable them to gain the confidence of the people, and through that get money for their stockholders, be permitted to say, when a claim is made upon them, that the agent had instructions, unknown to the public, restricting the powers they permitted him to exercise, and which he did exercise, or to say his powers were very limited, and we cannot answer for anything he may have done outside of the power especially given him. We desire it should be understood, in this jurisdiction at least, when an insurance company has appointed an agent, known and recognized as such, and he, by his acts known and acquiesced in by them, induces the public to believe he is vested with all the power and authority necessary for him to do the act, and nothing to the contrary is shown or pretended at the time of doing the act. Public policy, the safety of the people, demand the company should be liable for such of his acts as appear on their face to be usual and proper in and about the business in which the agent is engaged.

It is the fault of the companies in sending agents out among the people, gaining public confidence by the seeming acquiescence of their constituents in the conduct of their business. When a loss happens, they should not be permitted to say, in any case, their agent acted beyond the scope of his authority, unless it shall be made to appear the assured was informed of, and knew the precise

extent of the authority conferred. Any other principle, in its operation, would be turning loose upon an unsuspecting, honest and confiding people, a horde of plunderers, against which no ordinary vigilance could guard."

Aetna Ins. Co. v. *Maguire*, 51 Ills., 350.

What an agent has been permitted to do, it must be presumed he has been authorized to do.

Perkins v. *Washington Life Ins. Co.*, 7 Cowan, 635.

Private instructions not communicated to the insured will not avail the company as a defense.

Lightbody v. *American Life Ins. Co.*, 23 Wend., 18.

McEwen v. *Montg. County Ins. Co.*, 5 Hill, 101.

"The question in cases of this kind is not what power "did the agent in fact possess, but what power did the "company hold him out to the public as possessing. It "is immaterial what may have been said in the policy in "regard to the payment of the premium. It was within "the power of the company, acting through its agents, to "change entirely the mode of, or dispense with the pay- "ments as provided by the policy, and adopt a different "mode and time of payment."

Eclectic Life Ins. Co. v. *Fahrenburg*, 68 Ill., 707.

"Though as between the principal and agent, the pow- "ers of the agent may be limited, it still frequently occurs "that his powers are not thus limited when the rights of "third persons intervene, if the principal has so acted as to "induce such third person to act upon the assumption of "more extended or unlimited powers. * * * *

"Whether the company did thus hold their agent out, "was a question of fact to be submitted to the jury."

Keenan v. *The Mo. State Mutual Ins. Co.*, 12 Iowa, 131.

The extent of the agent's authority is a question for the jury.

Hough v. *The City Fire Ins. Co.*, 29 Conn., 10.

Sheldon v. *The Conn. Mutual Life Ins. Co.*, 25 Conn., 207.

Farmers' Ins. Co. v. *Taylor*, 73 Pa. St., 342.

A new consideration is not necessary to sustain a waiver of forfeiture and extension of time to pay premium or premium notes.

Lester v. *Knickerbocker Life Ins. Co.*, 2 Hun., (N. Y.), 618; 5 N. Y. S. C., 497.

Viele v. *Germania Ins. Co.*, 26 Iowa, 9.

"It is a well settled and salutary rule of law that a party "cannot insist upon a condition precedent when its non-"performance has been caused by himself."

Young v. *Hunter*, 6 N. Y., 207.

The record of this case is so brief that any synopsis of it seems unnecessary. The only issues of fact were whether the company's agent at Chicago had been authorized by the company to waive forfeitures and extend the payment of premium or premium notes; and if so authorized, did he extend the payment of the notes which had been given for the premium, and waive the for-

feiture, if any had occurred. The plaintiff below, in order to show that the agent had such authority, introduced George C. Randall as a witness, who had been connected with the company, in different capacities, for several years, and had been, we believe, the immediate predecessor of Frary, the agent at the time the present controversy started. Randall testified as to the powers exercised by the Chicago agents during the years he was familiar with the business of the company in Chicago, and his testimony upon the question of the authority of the Chicago agent, was very positively to the effect that such agent had been permitted by the company to exercise a very large measure of discretion and such authority as was claimed by the plaintiff.

This evidence the plaintiff in error claims should not have been admitted, and assigns as error, the ruling of the court in letting it go to the jury. Why it is not relevant and proper we fail to see, and if such kind of evidence would be inadmissable, policy-holders of an insurance company would hardly know how to deal with the company, except at its home office, and possibly then they would be in peril unless treating with just the proper officers.

A policy-holder knows the office rather than the agent. He cannot be expected to know of every change of agents, or when an old agent's authority has been limited or a new one appointed, with a narrower discretion. What has been done at the office and sanctioned by the company, expressly or by long practice, must dictate to policy-holders their rule of conduct.

A corporation being only a kind of abstraction, and dealing with the public exclusively through agents, must be held very strictly bound by such discretion and authority as it has allowed an agent to exercise. It cannot be

permitted to withdraw such authority without full and specific notice of the limitations upon former granted discretion. Any other rule would work great injustice, and especially, as in this case, where the home office was a thousand miles away, and the Chicago office was the only place where the insured had ever had communication or dealing.

What authority and discretion, therefore, a former agent had possessed was the very best kind of evidence (and in the case of a new agent would be the only available evidence) to show the authority of an agent.

If this evidence was admissable, and we believe the authorities previously cited, and the foregoing considerations, among others, show conclusively that it was then the jury's finding was proper, and certainly cannot be reconsidered here.

If the company had given any notice to the insured of a limitation of discretion in the agent, then, of course, our case would have failed before the jury.

Randall also testified as to the usage and practice of the company with reference to Judge Norton, specially, and that prompt payment had never been required of him; but all this the Court, on motion of the company's counsel, excluded by a statement made before the argument of counsel, and again in the instructions to the jury charged them particularly to disregard it.

There was some conflict of evidence as to whether time was given on the premium notes. The agent did not remember the arrangement sworn to by Martin Norton, the son of the judge, but Norton's testimony upon this point, as the record shows, was positive and circumstantial, and without question truthful.

It was a question legitimately and exclusively for the jury, and their decision of it ought to be conclusive.

Counsel for plaintiff in error suggest that there was no consideration shown for the extension and waiver.

This objection was not covered by the pleadings.

We have cited authorities in the brief showing that no consideration is necessary to sustain a waiver of forfeiture and an extension of time.

This policy of insurance had been in force at the time the company attempted to claim a forfeiture some eight or nine years, (the original had been issued in 1867, and the second one issued was only to replace it,) and cash premiums had been paid on account of *it* by Judge Norton, amounting to over three thousand dollars. This money so paid to the company had been worth to it, according to ordinary investment rates, between five and six thousand dollars. We mention this to show how profitable the business of insurance may become if rules of law, such as counsel for the company contend for, shall be laid down; according to their doctrine an agent may be clothed with an almost unlimited discretion to collect premiums, and allowed in doing so power to extend time and waive forfeitures; but this authority may only be exercised and only claimed for the profit of the company. In this way the condition in the policy which the counsel rely on, restricting the authority of agents, becomes a kind of catch clause, which the company may waive for its advantage, but which the policy holders shall always be strictly bound by. We do not believe the law sanctions any such practice, and we believe this Court will put its condemnation on it.

The instructions of the court below were careful and impartial, and supported by authority. The judgment in every respect seems just, and ought to be affirmed.

Respectfully submitted.

S. P. McCONNELL,

Attorney for Defendant in Error.